TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 272.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

WEBSTER EATON, ADMINISTRATOR OF THE ESTATE OF JOHN R. MATHEWS, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED MAY 10, 1900.

(17,748.)

(17,748.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 273.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

WEBSTER EATON, ADMINISTRATOR OF THE ESTATE OF JOHN R. MATHEWS, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

INDEX.

	Original.	Print.
Caption	1	1
Petition in error	1	1
Waiver of summons in error	10	7
Transcript from the district court of Thayer county	10	7
Caption	10	7
Petition	11	7
Security for costs	12	9
Answer	13	9
Amended reply	16	11
Motion to suppress portions of deposition of Puetz	17	12
Exceptions to depositions	18	12
Order sustaining exceptions and beginning trial	28	24
Instructions on behalf of plaintiff	29	25
Instructions requested by defendant	31	26
Verdict	32	27
Motion for new trial	33	28
Judgment	41	33

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 19, 1900.

	Original.	Print.
Clerk's certificate	42	34
Bill of exceptions	44	35
Reporter's certificate	44	35
Plaintiff's proposed amendments	45	35
Exhibit K—Caption to depositions	47	37
2—Notice of Treatise on Powers and Duties of Justices of the Peace	48	37
Index to testimony	50	38
Offer of deposition of J. C. Puetz and objections	52	38
W. G. Roberts and objections	53	40
G. L. Horn and objections	53	40
P. H. Matthews and objections	54	41
Testimony of J. D. Garmire	56	42
R. H. Matthews	58	43
Plaintiff rests	70	50
Offer of deposition of Dr. F. D. Crim and objections	70	50
Harry Foote and objections	86	58
Lewis Ryan and objections	92	61
Ernest Shellenberger and objections	99	64
Fred Foster and objections	102	66
Bert Foster and objections	104	67
Wm. E. Painter and objections	111	71
Bert Cambridge and objections	122	76
Miss Lettie Sidell and objections	126	78
Alonzo Cambridge and objections	133	82
Ernest Tyrer and objections	137	84
Wm. Weems and objections	156	96
Wm. Lonsdale and objections	162	100
Fred Lonsdale and objections	167	103
Mrs. Nettie Collier and objections	183	113
Testimony of C. H. Cherry	188	116
Miss Lettie Seidell	190	118
J. H. McKinstrey	191	118
R. W. Day	194	119
George J. Bishop	195	120
Offer of evidence of C. J. Bills *et al*	199	123
Testimony of P. H. Matthews	202	124
J. C. Puetz	206	126
Walton G. Roberts	211	130
G. L. Horn	212	131
F. D. Crim	217	134
Harry Foote	227	140
Lewis Ryan	234	144
Ernest Shellenberger	238	147
Fred Foster	241	149
Bert Foster	243	151
Wm. E. Painter	248	154
Bert Cambridge	256	158
Miss Lettie Siddell	258	160
Alonzo Cambridge	260	161
Ernest Tyerer	262	162
Walter Sidell	264	164
Wm. Weems	275	170

	Original.	Print
Testimony of Wm. Lonsdale	279	172
Fred Lonsdale	281	174
O. B. Ramey	284	176
Mrs. Nettie Collier	300	186
Exhibit 1—Letters of administration	304	189
Judge's certificate to bill of exceptions	305	189
Clerk's certificate to bill of exceptions	306	190
Motion for time to file briefs	307	191
Stipulation as to time to file briefs	307	191
Order fixing time to file briefs	308	192
Motion to dismiss	308	192
Order to file briefs	309	192
Judgment	310	193
Opinion	311	193
Clerk's certificate	312	194
Assignment of errors	313	194
Writ of error	319	197
Return on writ of error	321	198
Citation	323	199
Proof of service of citation	324	200

1 CHICAGO, R. I. & P. R. Co.
v.
WEBSTER EATON, Administrator. } No. 9150

Pleas before the supreme court of the State of Nebraska, at a term thereof begun and holden at the capitol, in the city of Lincoln, on the 2nd day of January, 1900.

Present: Hon. T. L. Norval, chief justice; Hon. J. J. Sullivan, Hon. Silas A. Holcomb, judges.

Attest: D. A. CAMPBELL, *Clerk.*

Be it remembered that on the 16th day of April, 1897, there *was* filed in the office of the clerk of said court a certain petition, transcript, bill of exceptions, and waiver in words and figures following, to wit:

In the Supreme Court of the State of Nebraska.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILway Company, Plaintiff in Error,
v.
WEBSTER EATON, Administrator of the Estate of John R. Mathews, Deceased, Defendant in Error. } Petition in Error.

The plaintiff in error, The Chicago, Rock Island & Pacific Railway Company, complains of the defendant in error, Webster Eaton, administrator of the estate of John R. Mathews, deceased, for that on the 18th day of November, 1896, the defendant in error recovered a judgment against the plaintiff in error in the district court of Thayer county, Nebraska, for the sum of fifteen hundred
2 dollars and costs of suit, taxed at $——, in an action pending in said court, wherein the defendant in error was plaintiff and the plaintiff in error was defendant. A transcript of the proceedings containing said final judgment is filed herewith.

The plaintiff in error alleges that there is error in said proceedings and judgment in this, to wit:

1. The court erred in overruling the motion of plaintiff in error for a new trial; to which ruling of the court plaintiff in error duly excepted. Transcript, page 34.

2. The court erred in refusing a new trial herein; to which ruling of the court plaintiff in error duly excepted. Transcript, page 34.

3. The damages are excessive, appearing to have been given under the influence of passion and prejudice.

4. The verdict of the jury is not sustained by sufficient evidence.

5. The verdict of the jury is contrary to law.

6. Errors of law occurring at trial, to which plaintiff in error duly excepted at the time.

7. The court erred in allowing defendant in error to introduce

testimony over objection of plaintiff in error that the petition did not state facts sufficient to constitute a cause of action in favor of defendant in error and against plaintiff in error. Bill of exceptions, page —.

8. The court erred in giving to the jury instruction numbered one of the instructions given to the jury on the court's own motion; to which plaintiff in error duly excepted. Transcript, page —.

9. The court erred in giving to the jury instruction numbered two of the instructions given to the jury on the court's own motion; to which plaintiff in error duly excepted. Transcript, page —.

10. The court erred in giving to the jury instruction numbered one of the instructions given to the jury on request of the defendant in error; to which plaintiff in error duly excepted. Transcript, page —.

11. The court erred in giving to the jury instruction num-
3 bered two of the instructions given to the jury on request of the defendant in error; to which plaintiff in error *in error* duly excepted. Transcript, page —.

12. The court erred in giving to the jury instruction numbered three of the instructions given to the jury on request of the defendant in error; to which plaintiff in error duly excepted. Transcript, page —.

13. The court erred in giving to the jury instruction numbered four of the instructions given *by* the jury on request of the defendant in error; to which plaintiff in error duly excepted. Transcript, page —.

14. The court erred in refusing to *to* give to the jury instruction numbered one of the instructions requested by the plaintiff in error; to which ruling of the court plaintiff in error duly excepted at the time. Transcript, page —.

15. The court erred in excluding and refusing to admit the testimony of the witness Harry Foote showing the condition of the railroad track, bridge, and trestle-work at the place of the wreck shortly after the wreck occurred; to which ruling of the court plaintiff in error duly excepted. Bill of exceptions, page —.

16. The court erred in excluding and refusing to admit the testimony of the witness Harry Foote as to the speed at which the train in question had been run and operated for several months immediately prior to the time of the wreck in question; to which ruling plaintiff in error duly excepted. Bill of exceptions, page —.

17. The court erred in refusing to admit the answer of the witness Harry Foote to the questions numbered 19 to 37, inclusive, and erred in refusing to admit each of them; to each of which rulings of the court plaintiff in error duly excepted. Bill of exceptions, pages —.

18. The court erred in sustaining the objections of the defendant in error to questions numbered 19 to 37, inclusive, in the deposition of Harry Foote, and erred in sustaining defendant in error's objections to each of said questions, and erred in excluding the answers to each of said questions; to each of which rulings of the
4 court plaintiff in error duly excepted. Bill of exceptions, pages —.

19. The court erred in excluding, on objection of defendant in error, the answers of the witness Harry Foote to questions numbered 19 to 37, inclusive, and erred in sustaining defendant in error's objections to each of said questions, and erred in excluding each of the answers to each of said questions; to each of which said rulings of the court plaintiff in error duly excepted. Bill of exceptions, pages —.

20. The court erred in excluding, on objection of defendant in error, the answers of the witness F. D. Crim to questions numbered 1 to 50, inclusive, and erred in sustaining defendant in error's objections to each of said questions, and erred in excluding the answers to each of said questions; to each of which said rulings of the court plaintiff in error duly excepted. Bill of exceptions, page —.

21. The court erred in excluding, on objection of defendant in error, *and* answers of the witness Lewis Ryan to questions numbered 1 to 33, inclusive, and 52, and erred in sustaining defendants in error's objection to each of said questions, and erred in excluding the answers to each of said questions; to each of which said rulings of the court plaintiff in error duly excepted. Bill of exceptions, page —.

22. The court erred in excluding, on objection of defendant in error, the answers of the witness Earnest Shelleberger to questions numbered 53 to 67, inclusive, and erred in sustaining defendants in error's objection to each of said questions, and erred in excluding the answers to each of said questions; to each of which said rulings of the court plaintiff in error duly excepted. Bill of exceptions, pages —.

23. The court erred in excluding, on objection of defendant in error, the an-wers of the witness Fred Foster to questions numbered 87 to 103, inclusive, and erred in sustaining defendants in error'- objections to each of said questions, and erred in excluding the answers to each of said questions; to each of which said rulings of the court plaintiff in error duly excepted. Bill of exceptions, page —.

24. The court erred in excluding, on objection of defendant in error, the answers of the witness Bert Foster to questions numbered 105 to 137, inclusive, and erred in sustaining defendant in error's objections to each of said questions, and erred in excluding the answers to each of said questions; to each of which said rulings of the court plaintiff in error duly excepted. Bill of exceptions, pages —.

25. The court erred in excluding, on objection of defendant in error, the answers of the witness W. E. Painter to questions numbered 169 to 205, inclusive, and 221 to 224, inclusive, and erred in sustaining defendant in error's objections to each of said questions; to each of which said rulings of the court plaintiff in error duly excepted. Bill — exceptions, page —.

26. The court erred in excluding, on objection of defendant in error, the answers of the witness Bert Cambridge to questions numbered 225 to 245, inclusive, and erred in sustaining defendant in error's objection to each of said questions, and erred in excluding the

answers to each of said questions; to each of which said rulings of the court plaintiff in error duly excepted. Bill of exceptions, page —.

27. The court erred in excluding, on objection of the defendant in error, the answers of the witness Miss Lettie Seidell to questions numbered 250 to 280, inclusive, and erred in sustaining defendant in error's objection to each of said questions, and erred in excluding the answers to each of said questions; to each of which said rulings of the court plaintiff in error duly excepted. Bill of exceptions, page —.

28. The court erred in excluding, on objection of defendant in error, the answers of the witness Alonzo Cambridge to questions numbered 284 to 299, inclusive, and erred in sustaining defendants in error's objections to each of said questions, and erred in excluding the answers to each of said questions; to each of which said rulings of the court plaintiff in error duly excepted. Bill of exceptions, page —.

29. The court erred in excluding, on objection of defendant in error, the answers of the witness Ernest Tyrer to questions numbered 300 to 323, inclusive, and erred in sustaining defendants in error's objections to each of said questions, and erred in excluding the answers to each of said questions; to each of which said rul-

6 ings of the court plaintiff in error duly excepted. Bill of exceptions, page —.

30. The court erred in excluding, on objection of defendant in error, the answers of the witness Walter Seidell to questions numbered 324 to 386, inclusive, and erred in sustaining defendants in error's objection to each of said questions, and erred in excluding the answers to each of said questions; to each of which said ruling of the court plaintiff in error duly excepted. Bill of exceptions, page —.

31. The court erred in excluding, on objection of defendant in error, the answers of the witness William Weems to questions numbered 417 to 448, inclusive, and erred in sustaining the objection of defendant in error to each of said questions, and erred in excluding the answers to each of said questions; to each of which said rulings of the court plaintiff in error duly excepted. Bill of exceptions, page —.

32. The court erred in excluding, on objection of defendant in error, the answers of the witness William Lonsdale to question-numbered 449 to 471, inclusive, and erred in sustaining the defendant in error's objection to each of said questions, and erred in excluding the answers to each of said questions; to each of which said rulings of the court plaintiff in error duly excepted. Bill of exceptions, page —.

33. The court erred in excluding, on objection of defendant in error, the answers of the witness Fred Lonsdale to question- numbered 472 to 500, inclusive, and erred in sustaining defendant in error's objection to each of said questions, and erred in excluding the answers to said questions; to each of which said rulings of the court the plaintiff in error duly excepted. Bill of exceptions, page —.

34. The court erred in excluding, on objection of defendant in error, the answers of the witness O. B. Ramey to questions numbered 501 to 530, inclusive; 591 to 595, inclusive; 614 to 618, inclusive, and 620 to 621, inclusive, and erred in sustaining the objections of defendant in error to each of said questions, and erred in excluding the answers to each of said questions; to each of which said rulings of the court plaintiff in error duly excepted. Bill of exceptions, page —.

7 35. The court erred in excluding, on objection of defendant in error, the answers of the witness Mrs. Nettie Collier to questions numbered 627 to 646, inclusive, and erred in sustaining defendant in error'- objection to each of said questions and erred in excluding the answers to each of said questions; to each of which said rulings of the court plaintiff in error duly excepted. Bill of exceptions, page —.

36. The court erred in excluding the evidence of the witness J. H. McKinstry, offered by the plaintiff in error, showing the condition and character of plaintiff in error's railroad track, trestle-work, and bridge and the appliances thereof at the place where it is claimed the deceased was killed and on the evening of August 9, 1894, before the wreck in question occurred and before the train referred to in defendant in error's petition was derailed; to which ruling of the court plaintiff in error duly excepted. Bill — exceptions, page —.

37. The court erred in excluding the evidence of the witness J. H. McKinstery, offered by plaintiff in error, showing the condition of the plaintiff in error's railroad track, bridge, and trestle-work and the appliances thereof on the night of the wreck in question and after the train referred to in defendant in error's petition was derailed.

38. The court erred in excluding the evidence of the witness G. J. Bishop, offered by plaintiff in error, showing the condition and character of the plaintiff in error's railroad track and bridge at the place where it is claimed the deceased was killed and on either side thereof before and after the derailment of the train referred to in defendant in error's petition and at all times in question; to which rulings of the court plaintiff in error duly excepted. Bill of exceptions, page —.

39. The court erred in excluding the evidence of the witness C. H. Cherry, offered by the plaintiff in error, showing the manner and the speed at which the train in question was being run and operated at the time it is claimed the deceased was killed and the manner and speed at which it was customary to operate and run said train over the track in question at the place in question and in

8 other places, and that he had in his possession at the time of said derailment the money and passes reffer-ed to in said offer of his testimony; to which plaintiff in error duly excepted. Bill of exceptions, page —.

40. The court erred in excluding the evidence of the witness R. W. Day, offered by the plaintiff in error, showing the condition and character of plaintiff in error's railroad at the place where it is claimed the deceased was killed, and on either side thereof, before and after the death of the deceased, as alleged in the petition, and showing

that said railroad extended in a straight line in either direction from the place where the train in question was derailed, and that the derailment occur-ed at a place in said track where there was no curve, and also showing the kind and character of the most skilfully and prudently conducted railroads in the United States, and the kind and character of the meterials used in the construction and maintenance of plaintiff in error's road at all points in question, and showing the manner in which and the speed at which trains on plaintiffs in error's railroad and on other railroads were at all times in question run and operated; to which ruling plaintiff in error duly excepted. Bill of exceptions, page —.

41. The court erred in excluding the evidence of the witness Lettie Seidell, offered by plaintiff in error, showing the condition of the plaintiff in error's railroad *showing the condition of the plaintiffs in error's railroad* at all places in question within a few minutes after the derailment of the train in question, and showing that the witness found the passes and money referred to in the offer of her testimony at the time and place stated in said offer; to which plaintiff in error duly excepted. Bill of exceptions, page —.

42. The court erred in sustaining the exceptions of defendant in error, filed November 17, 1896, to the depositions of the witnesses Lewis Ryan, Earnest Shellaberger, Fred Foster, Bert Foster, William E. Painter, Fred Lonsdale, O. B. Ramey, Nettie Collier, Bert Cambridge, Lettie Seidell, Alonzo Cambridge, Earnest Tyrer, Walter Seidell, William Weems, Harry Foote, F. D. Crim, and
9 William Lonsdale, and erred in sustaining defendant in error's objection to each question contained in said depositions; to each of which rulings of the court plaintiff in error duly excepted. Bill of exceptions, page —.

43. The court erred in admitting in evidence the certified copy of letters of administration offered by defendant in error, to which plaintiff in error duly excepted. Bill of exceptions, page —.

44. The verdict should have been for the plaintiff in error.

45. The court should have instructed the jury to return a verdict for the plaintiff in error.

46. The court failed to properly instruct the jury with reference to the law of the case.

47. The petition does not state facts sufficient to constitute a cause of action in favor of the defendant in error and against the plaintiff in error.

48. The court erred in instructing the jury as follows:

1. "The jury are instructed that if you find from the evidence that John R. Mathews was a passenger being carried on the train of the defendant railway company that was derailed and wrecked near Lincoln, Nebraska, on August 9, 1894, thereby causing the death of said Mathews, and that plaintiff is the administrator of the estate of said Mathews, then you should find for the plaintiff if you find a pecuniary loss from such death has resulted to the next of kin, in this case, the father." The statute upon which the foregoing instruction is based is contrary to and inconsistent with the fourteenth amendment to the Constitution of the United States, which provides

that no State shall deprive a person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws; and with sections three and twenty-one of article I of the constitution of Nebraska.

Wherefore the plaintiff in error prays that said judgment may be reversed and a new trial granted in said cause, and for such other relief as justice may require.

10

W. F. EVANS,
L. W. BILLINGSLEY,
R. J. GREENE,
Attorneys for Plaintiff in Error.

I hereby waive the issuing and service of summons in error herein and enter an appearance in this case.

STEWART & MUNGER,
Attorney for Plaintiff.

Endorsement: No. 9150. Chicago, R. I. & P. R. Co. *v.* Eaton. Petition in error and waiver. Supreme court of Nebraska. Filed Apr. 16, 1897. D. A. Campbell, clerk.

Transcript.

Pleas before the district court of the seventh judicial district *district* of Nebraska in and for the county of Thayer, at a term thereof begun and holden in the city of Hebron, in said county and State, on the 9th day of November, one thousand eight hundred and ninety-six.

Present: Honorable W. G. Hastings, judge; A. Lindsey, sheriff; Geo. W. Wasson, clerk.

The following proceedings were had and done, to wit:

Be it remembered that at the several times hereinafter set forth were filed in the office of the clerk of said court papers and pleadings, of which the following are full, true, and correct copies, and proceedings were had and done in the cause below named as follows, to wit:

January 27, 1896, a petition was filed in the office of the clerk of said court in words and figures following, to wit:

11 In the District Court of Thayer County, Nebraska.

WEBSTER EATON, as Administrator of the Estate of John R. Mathews, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.
} Petition.

1.

The plaintiff above named complains of the defendant and alleges that on the 19th day of April, 1895, this plaintiff was duly appointed and qualified as administrators and letters of administration

of the estate of John R. Mathews, deceased, were duly issued and granted to him by the probate court of Lancaster county, Nebraska, and the plaintiff sues as such administrator.

2.

That the defendant — and at the times hereinafter mentioned was a corporation, duly incorporated under the laws of the State of Nebraska, and owned and operated a railroad therein known as the Chicago, Rock Island and Pacific railway, and was and is a common carrier of passengers for hire between the places hereinafter mentioned and between the stations of Fairbury, Nebraska, and Lincoln, Nebraska, all of which railroad between said stations is in the State of Nebraska.

3.

On or about the 9 day of August, 1894, the said defendant, in consideration of the sum of $1.70, received the said John R. Mathews, then living, as a passenger on said railroad from Fairbury, Nebraska, to Lincoln, Nebraska, and while said John R. Mathews was on the cars on the said journey as a regular passenger, at a distance of about five miles south of Lincoln, Nebraska, and in this State, the car in which said John R. Mathews was riding was, by the
12 negligence of the defendant and its servants, derailed and thrown from and ran off the track, and that said John R. Mathews was, without fault or neglect on his part, thereby killed.

4.

Plaintiff further alleges that R. H. Mathews, as father, and his wife, Mrs. R. H. Mathews, as mother of the said John R. Mathews, are next to kin and heirs-at-law of said John R. Mathews, and that they were partially dependant upon him for support, and recieved from him for such support and contribution the sum of about $250.00 per year, and they and each of them have been permanently deprived of the service and support and contributions from the date of his said death, and of the reasonable expectation of such continued and other pecuniary assistance, benefit, contributions, and support in the future during their and his probable duration of life, and have sustained damages by reason of defendant's and their servants' negligence in the loss and damage described, and have suffered damage in all to the sum of $5,000.00, for which, with costs of suit, plaintiff prays judgment.

C. L. RICHARDS,
STEWART & MUNGER,
Attorneys for Plaintiff.

STATE OF NEBRASKA, } ss:
Lancaster County, }

John M. Stewart, being first duly sworn, deposes and says that he is one of the attorney- for the plaintiff, and that plaintiff is absent from the State, and that he bl*e*ieves the above allegations are true.

JOHN M. STEWART.

Subscribed and sworn to before me this 18 day of November, 1895.

[SEAL.] THOMAS C. MUNGER,
Notary Public.

We hereby agree to become *to become* security for costs on this case.

JAS. DINSMORE.
C. L. RICHARDS.

Security approved Jan. 27, 1896.

[SEAL.] GEO. W. WASSON,
Clerk District Court.

13 And afterwards, on the 19 day of February, 1896, there was filed in the office of said clerk answer in words and figures following, to wit:

In the District Court of Thayer County, Nebraska.

WEBSTER EATON, as Administrator of the Estate of John R. Mathews, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY Company, Defendant. } Answer.

Comes now said defendant, and, for answer to the plaintiff's petition in the above-entitled cause, denies all *the* singular the allegations thereof, except such as are hereinafter expressly admitted.

2.

Further answering, defendant admits and avers:

1.

That it is — at all times mentioned in said petition was a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa and a domestic corporation of the State of Nebraska.

2.

That at all times mentioned in said petition it was the owner of and was operating a railroad in the State of Nebraska, and was and is a carrier of passenger- for hire between the stations of Fairbury, Nebraska, and Lincoln, Nebraska, on said railway, but the defendant denies that the said John R. Mathews, deceased, mentioned in said petition, was injured in any way by reason of the carelessness or negligence of this defendant or any of its servants, agents, or employés, and denies that the said John R. Mathews was killed by reason of any carelessness or negligence on the part of the
14 defendant or any of its servants, agents, or employés.

III.

Further answering, the defendant avers that on or about the 9 day of August, 1894, near Lincoln, in the county of Lancaster, State of

Nebraska, and at the time in said petition stated, the train and car mentioned in said petition, while being run and operated with all possible care and caution, were by some person or persons not in the employ or under the control of the defendant and without its knowledge willfully, maliciously, and feloniously derailed and thrown from the track on which they and each of them were at said time being run and operated, resulting in great loss to the defendant, its servants, agents, and employés; that said person or persons who derailed and threw said train and car from the track, as aforesaid, willfully, maliciously, and feloniously removed and displaced from the track aforesaid, at the point of said derailment, certain spikes, nuts, angle bars, fish-plates, bolts, and rails and otherwise tore up and destroyed said track of defendant at the point aforesaid, and caused said car and train to be derailed and thrown from the track, as aforesaid, without any carelessness or negligence on the part of the defendant or any of its agents, servants, or employés; that said car and train at the time of being derailed and thrown from the track, as aforesaid, and at all other times, was operated and run in a skilful and proper manner and with great care and caution; that the said railroad and track at the point aforesaid and at all other points was kept and maintained in good and safe condition and repair, and that the defendant did not know and had no means of knowing at the time of said derailment or prior thereto of the removal or displacement from said track of said nuts, bolts, angle bars, fish-plates, and rails, or either of them, and did not know and had no means of knowing that said track at said point had been torn up or destroyed, and that the defendant could not by the exercise of utmost care, caution, produ-ce, and foresight have prevented said derailment and wrecking of said train and car.

15 The defendant avers that as to whether the said John R. Mathews, mentioned in said petition, was on said train or car at the time of said derailment it has no knowledge or information thereof sufficient to form a be*half*, and that as to whether said plaintiff was, on the 19th day of April, 1895, or at any other time, duly appointed and qualified as administrator of the estate of said John R. Mathews, deceased, the defendant has not knowledge or information sufficient to form a belief.

And, having fully answered, the defendant asks to be discharged hence, with its costs in this behalf laid out and expended.

W. F. & J. E. DOLMAN,
Attorneys for Defendant.

THE STATE OF NEBRASKA, } ss:
County of Shawnee, }

W. F. Evans, of lawful age, being first duly sworn, deposes and says that he is agent and attorney of the above-named defendant, having authority to make, and as such makes, this affidavit; that he has read the above and foregoing answer, and that the facts therein stated are true, as he verily believes.

W. F. EVANS.

Subscribed and sworn to before me this 18 day of February, 1896.
A. A. GRAHAM,
[SEAL.] *Notary Public.*

And afterwards, on the 17 day of March, 1896, there was filed in the office of said clerk a reply; and afterwards, on the 16 day of November, 1896, an amended reply was filed, by leave of the court, in words and figures following, to wit:

16 In the District Court of Thayer County, Nebraska.

WEBSTER EATON, as Administrator of the Estate of John R. Mathews, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.
} Amended Reply.

The plaintiff, by way of amended reply to the answer of defendant, admits that the defendant is, and at all times mentioned in plaintiff's petition was, a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa, and was — domestic corporation of the State of Nebraska; plaintiff also admits that at all times mentioned in plaintiff's petition it was the owner of and was operating a railroad in the State of Nebraska, and was and is a carrier of passengers for hire between the stations of Martel, Nebraska, and Lincoln, Nebraska, on said railway.

Plaintiff further admits that on or about the 9 day of August, 1894, near Lincoln, in the county of Lancaster, State of Nebraska, and at the time in the petition stated, the train and car mentioned in the petition was derailed and thrown from the track on which they and each of them were at said time being run and operated, and denies each and every other allegation in the answer contained.

STEWART & MUNGER,
Attorneys for Plaintiff.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

John M. Stewart, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff, and that he believes the above allegations are true.

——.

Subscribed and sworn to before me this — day of November, 1896.

——.

Verification waived and filing on the date agreed to, November 16, 1896.

W. F. EVANS &
L. W. BILLINGSLEY,
For Defendant.

17 And afterwards, on the 16 day of November, 1896, there *was* filed in the office of said clerk objections of defendant to portions of deposition of J. C. Puetz in words and figures following, to wit:

In the District Court of Thayer County, Nebraska.

WEBSTER EATON, Administrator of the Estate of John R. Mathews, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

Comes now said defendant and objects to and moves the court to suppress the following portions of the deposition of the witness J. C. Puetz taken herein by the plaintiff:

Q. "About what rate of speed was the train going at the time of the wreck, as near as you can tell?"

Defendant objects to this question for the reason that the competency of the witness to answer the same is not shown, nor is it shown that the witness gave any attention to the speed of the train or the manner in which it was running.

To what portion of the answer to said question, to wit, "The train was going very fast," the defendant objects because the same is not responsive to the question and for the reason that competancy of the witness to testify the speed of the train is not shown, nor is it shown that the witness gave any attention to the speed of the train in question.

W. F. EVANS AND
L. W. BILLINGSLEY,
Attorney- for Defendant.

18 And afterwards, on the 17 day of November, 1896, there *was* filed in the office of said clerk exceptions to depositions in words and figures following, to wit:

Exceptions to Depositions.

In the District Court of Thayer County, Nebraska.

WEBSTER EATON, as Administrator of the Estate of John R. Mathews, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

The plaintiff objects and excepts, in addition to the objections appearing in the depositions themselves, to the several questions and answers in the depositions filed in this case of Lewis Ryan, Earnest Shelleberger, Fred Foster, Bert Foster, William E. Painter, Fred Londale, O. B. Ramey, Nettie Collier, Bert Cambridge, Lettie Sidell, Alonzo Cambridge, Earnest Tyrer, Walter Sidell, F. D. Crim, William Weims, Harry Foote, William Lonsdale, the numbers referring

to the number of the question and answer thereto. Plaintiff objects and excepts to the questions asked Lewis Ryan as follows:

Plaintiff objects to question 6, as incompetant, irrelevant, and immeterial.

" " " 7 " "
" " " 8 " "
" " " 9 " "
" " " 10 " "
" " " 11 " "
" " " 12 " "
" " " 13 " "
" " " 14 " "
" " " 15 " "
" " " 16 " "
" " " 17 " "
" " " 18 " "
" " " 19 " "
" " " 20 " "
" " " 21 " "
" " " 22 " "
" " " 23 " "

19 Plaintiff objects to question 24 as incompetent, irrelevant, and immeterial.

" " " 25 " "
" " " 26 " "
" " " 27 " "
" " " 28 " "
" " " 29 " "
" " " 30 " "
" " " 31 " "
" " " 32 " "
" " " 33 " "
" " " 34 " "
" " " 35 " "
" " " 36 " "
" " " 37 " "
" " " 38 " "
" " " 39 " "
" " " 40 " "
" " " 41 " "
" " " 42 " "
" " " 43 " "
" " " 44 " "
" " " 45 " "
" " " 46 " "
" " " 47 " "
" " " 48 " "
" " " 49 " "
" " " 50 " "
" " " 51 " "
" " " 52 " "

Plaintiff objects to the questions asked Earnest Shellenbarger and the answers to each question as follows:

Plaintiff objects to question 53 as incompetant, irrelevant, and immeterial.

" " " 54 " "
" " " 55 " "
" " " 56 " "
" " " 57 " "
" " " 58 " "
" " " 59 " "
" " " 60 " "
" " " 61 " "
" " " 62 " "
" " " 63 " "
" " " 64 " "
" " " 65 " "
" " " 66 " "
" " " 67 " "

Plaintiff objects and excepts to the questions propounded to Fred Foster and to each and to all answers as follows:

Plaintiff objects to question 87 as incompetant, irrelevant, and immeterial.

" " " 88 " "
" " " 89 " "
" " " 90 " "
" " " 91 " "
" " " 92 " "
" " " 93 " "
" " " 94 " "
" " " 95 " "
" " " 96 " "
" " " 97 " "
" " " 98 " "

20 Plaintiff objects to question 99 as incompetant, irrelevant, and immeterial.

" " " 100 " "
" " " 101 " "
" " " 102 " "
" " " 103 " "

Plaintiff objects to the question asked Bert Foster and to each of them as follows:

Plaintiff objects to question 105 as incompetant, irrelevant, and immeterial.

" " " 106 " "
" " " 107 " "
" " " 108 " "
" " " 109 " "
" " " 110 " "
" " " 111 " "
" " " 112 " "
" " " 113 " "

Plaintiff objects to question 114 as incompetent, irrelevant, and immeterial.

" " " 115 " "
" " " 116 " "
" " " 117 " "
" " " 118 " "
" " " 119 " "
" " " 120 " "
" " " 121 " "
" " " 122 " "
" " " 123 " "
" " " 124 " "
" " " 125 " "
" " " 126 " "
" " " 127 " "
" " " 128 " "
" " " 129 " "
" " " 130 " "
" " " 131 " "
" " " 132 " "
" " " 133 " "
" " " 134 " "
" " " 135 " "
" " " 136 " "
" " " 137 " "

Plaintiff objects to the questions asked witness William E. Painter as follows:

Plaintiff objects to question 169 as incompetant, irrelevant, and immeterial.

" " " 170 " "
" " " 171 " "
" " " 172 " "
" " " 173 " "
" " " 174 " "
" " " 175 " "
" " " 176 " "
" " " 177 " "
" " " 178 " "
" " " 179 " "

21 Plaintiff objects to question 180 as incompetant, irrelevant, and immeterial.

" " " 181 " "
" " " 182 " "
" " " 183 " "
" " " 184 " "
" " " 185 " "
" " " 186 " "
" " " 187 " "
" " " 188 " "
" " " 189 " "
" " " 190 " "

Plaintiff objects to question 191 as incompetent, irrelevant, and immeterial.

" " " 192 " "
" " " 193 " "
" " " 194 " "
" " " 195 " "
" " " 196 " "
" " " 197 " "
" " " 198 " "
" " " 199 " "
" " " 200 " "
" " " 201 " "
" " " 202 " "
" " " 203 " "
" " " 204 " "
" " " 205 " "
" " " 221 " "
" " " 222 " "
" " " 223 " "
" " " 224 " "

Plaintiff objects to the question- asked *of* Bert Cambridge and to each of them as follows:

Plaintiff objects to question 225 as incompetent, irrelevant, and immeet-rial.

" " " 226 " "
" " " 227 " "
" " " 228 " "
" " " 229 " "
" " " 230 " "
" " " 231 " "
" " " 232 " "
" " " 233 " "
" " " 234 " "
" " " 235 " "
" " " 236 " "
" " " 237 " "
" " " 238 " "
" " " 240 " "
" " " 241 " "
" " " 242 " "

22 Plaintiff objects to question 243 as incompetent, irrelevant, and immeterial.

" " " 244 " "
" " " 245 " "

Plaintiff objects to questions asked Lettie Sidell and to each of them as follows:

Plaintiff objects to question 250 as incompetent, irrelevant, and immeterial.

" " " 251 " "
" " " 252 " "

Plaintiff objects to question 252 as incompetent, irrelevant, and immeterial.

" " " 254 " "
" " " 255 " "
" " " 256 " "
" " " 257 " "
" " " 258 " "
" " " 259 " "
" " " 260 " "
" " " 261 " "
" " " 262 " "
" " " 263 " "
" " " 264 " "
" " " 265 " "
" " " 266 " "
" " " 267 " "
" " " 268 " "
" " " 269 " "
" " " 270 " "
" " " 271 " "
" " " 272 " "
" " " 273 " "
" " " 274 " "
" " " 275 " "
" " " 276 " "
" " " 277 " "
" " " 278 " "
" " " 279 " "
" " " 280 " "

Plaintiff objects to the questions asked Alonzo Cambridge and to each of them as follows:

Plaintiff objects to question 284 as incompetent, irrelevant, and immeterial.

" " " 285 " "
" " " 286 " "
" " " 287 " "
" " " 288 " "
" " " 289 " "
" " " 290 " "
" " " 291 " "
" " " 292 " "
" " " 293 " "
" " " 294 " "
" " " 295 " "
" " " 296 " "
" " " 297 " "
" " " 298 " "
" " " 299 " "

Plaintiff objects to the questions asked Earnest Tyrer and to each of them as follows:

23 Plaintiff objects to question 300 as incompetent, irrelevant, and immaterial.

" " " 301 " "
" " " 302 " "
" " " 303 " "
" " " 304 " "
" " " 305 " "
" " " 306 " "
" " " 307 " "
" " " 308 " "
" " " 309 " "
" " " 310 " "
" " " 311 " "
" " " 312 " "
" " " 313 " "
" " " 314 " "
" " " 315 " "
" " " 316 " "
" " " 317 " "
" " " 318 " "
" " " 319 " "
" " " 320 " "
" " " 321 " "
" " " 322 " "
" " " 323 " "

Plaintiff objects to the questions asked Walter Sidell and to each of them as follows:

Plaintiff objects to question 324 as incompetent, irrelevant, and immaterial.

" " " 325 " "
" " " 326 " "
" " " 327 " "
" " " 328 " "
" " " 329 " "
" " " 330 " "
" " " 331 " "
" " " 332 " "
" " " 333 " "
" " " 334 " "
" " " 335 " "
" " " 336 " "
" " " 337 " "
" " " 338 " "
" " " 339 " "
" " " 340 " "
" " " 341 " "
" " " 342 " "
" " " 343 " "
" " " 344 " "
" " " 345 " "
" " " 346 " "

Plaintiff objects to question 347 as incompetent, irrelevant, and immeterial.

" " " 348 " "
" " " 349 " "
" " " 350 " "
" " " 351 " "
" " " 352 " "
" " " 353 " "
" " " 354 " "
" " " 355 " "
" " " 356 " "
" " " 357 " "
" " " 358 " "

24 Plaintiff objects to question 359 as incompetent, irrelevant, and immeterial.

" " " 360 " "
" " " 361 " "
" " " 362 " "
" " " 363 " "
" " " 364 " "
" " " 365 " "
" " " 366 " "
" " " 367 " "
" " " 368 " "
" " " 369 " "
" " " 370 " "
" " " 371 " "
" " " 372 " "
" " " 373 " "
" " " 374 " "
" " " 375 " "
" " " 376 " "
" " " 377 " "
" " " 378 " "
" " " 379 " "
" " " 380 " "
" " " 381 " "
" " " 382 " "
" " " 383 " "
" " " 384 " "
" " " 385 " "
" " " 386 " "

Plaintiff objects to questions asked William Weems and to each of them as follows:

Plaintiff objects to question 417 as incompetent, irrelevant, and immeterial.

" " " 418 " "
" " " 419 " "
" " " 420 " "
" " " 421 " "
" " " 422 " "
" " " 423 " "

Plaintiff objects to question 424 as incompetent, irrelevant, and immeterial.

" " " 425 " "
" " " 426 " "
" " " 427 " "
" " " 428 " "
" " " 429 " "
" " " 430 " "
" " " 431 " "
" " " 432 " "
" " " 433 " "
" " " 434 " "
" " " 435 " "
" " " 436 " "
" " " 437 " "
" " " 438 " "
" " " 439 " "
" " " 440 " "
" " " 441 " "
" " " 442 " "
" " " 443 " "
" " " 444 " "
" " " 445 " "
" " " 446 " "
" " " 447 " "
" " " 448 " "

25 Plaintiff objects to the questions asked William Lonsdale, and to each of them, as follows:

Plaintiff objects to question 449 as incompetent, irrelevant, and immeterial.

" " " 450 " "
" " " 451 " "
" " " 452 " "
" " " 453 " "
" " " 454 " "
" " " 455 " "
" " " 456 " "
" " " 457 " "
" " " 458 " "
" " " 459 " "
" " " 460 " "
" " " 461 " "
" " " 462 " "
" " " 463 " "
" " " 464 " "
" " " 465 " "
" " " 466 " "
" " " 467 " "
" " " 468 " "
" " " 469 " "
" " " 470 " "
" " " 471 " "

Plaintiff objects to the questions asked Fred Lonsdale, and to each of them, as follows:

Plaintiff objects to question 472 as incompetent, irrelevant, and immeterial.

" " " 473 " "
" " " 474 " "
" " " 475 " "
" " " 476 " "
" " " 477 " "
" " " 478 " "
" " " 479 " "
" " " 480 " "
" " " 481 " "
" " " 482 " "
" " " 483 " "
" " " 484 " "
" " " 485 " "
" " " 486 " "
" " " 487 " "
" " " 488 " "
" " " 489 " "
" " " 490 " "
" " " 491 " "
" " " 492 " "
" " " 493 " "
" " " 494 " "
" " " 495 " "
" " " 496 " "
" " " 497 " "
" " " 498 " "
" " " 499 " "
" " " 500 " "

26 Plaintiff objects to questions asked O. B. Ramey as follows:

Plaintiff objects to question 501 as incompetent, irrelevant, and immeterial.

" " " 502 " "
" " " 503 " "
" " " 504 " "
" " " 505 " "
" " " 506 " "
" " " 507 " "
" " " 508 " "
" " " 509 " "
" " " 510 " "
" " " 511 " "
" " " 512 " "
" " " 513 " "
" " " 514 " "
" " " 515 " "
" " " 516 " "

Plaintiff objects to question 517 as incompetent, irrelevant, and immeterial.

" " " 518 " "
" " " 519 " "
" " " 520 " "
" " " 521 " "
" " " 522 " "
" " " 523 " "
" " " 524 " "
" " " 525 " "
" " " 526 " "
" " " 527 " "
" " " 528 " "
" " " 529 " "
" " " 530 " "
" " " 591 " "
" " " 592 " "
" " " 593 " "
" " " 594 " "
" " " 595 " "
" " " 614 " "
" " " 615 " "
" " " 616 " "
" " " 617 " "
" " " 618 " "
" " " 620 " "
" " " 621 " "

Plaintiff objects to the question- asked *by* Mrs. Nettie Collier, and to each of them, as follows:

Plaintiff objects to question 627 as incompetent, irrelevant, and immeterial.

" " " 628 " "
" " " 629 " "
" " " 630 " "
" " " 631 " "
" " " 632 " "
" " " 633 " "
" " " 634 " "
" " " 635 " "
" " " 636 " "
" " " 637 " ",

27 Plaintiff objects to question 638 as incompetent, irrelevant, and immeterial.

" " " 639 " "
" " " 640 " "
" " " 641 " "
" " " 642 " "
" " " 643 " "
" " " 644 " "
" " " 645 " "
" " " 646 " "

Plaintiff objects to questions asked F. D. Crim in his deposition on file in this case, and to each of them, as follows:

Plaintiff objects to question 1 as incompetent, irrelevant, and immeterial.

" " " 2 " "
" " " 3 " "
" " " 4 " "
" " " 5 " "
" " " 6 " "
" " " 7 " "
" " " 8 " "
" " " 9 " "
" " " 10 " "
" " " 11 " "
" " " 12 " "
" " " 13 " "

Plaintiff objects to questions 11, 12, and 13, as no foundation laid and calling for a conclusion.

Pl't'f objects to Q. 14 as incompetent, irrelevant, immeterial, calling for a conclusion.

" " " 15 " " "
" " " 16 " " "
" " " 17 " " "
" " " 18 " " "
" " " 19 " " "
" " " 20 " " "
" " " 21 " " "
" " " 22 " " "
" " " 23 " " "
" " " 24 " " "
" " " 25 " " "
" " " 26 " " "
" " " 27 " " "
" " " 28 " " "
" " " 29 " " "
" " " 30 " " "
" " " 31 " " "
" " " 32 " " "
" " " 33 " " "
" " " 34 " " "
" " " 35 " " "
" " " 36 " " "
" " " 37 " " "
" " " 38 " " "
" " " 39 " " "
" " " 40 " " "
" " " 41 " " "
" " " 42 " " "
" " " 43 " " "
" " " 44 " " "
" " " 45 " " "

Pl't'f objects to Q. 46 as incompetent, irrelevant, immeterial, calling for a conclusion.

" " " 47 " " "

" " " 48 " " "

" " " 49 " " "

28 Pl't'f objects to Q. 50 as incompetent, irrelevant, immeterial, calling for a conclusion.

Plaintiff objects to questions asked Harry Foote, as shown by his deposition on file, as follows:

Pl't'f objects to Q. 19 as incompetent, irrelevant, immeterial, calling for a conclusion.

Pl't'f objects to Q. 20 as incompetent, irrelevant, immeterial, calling for a conclusion.

Pl't'f objects to Q. 24 as incompetent, irrelevant, immeterial, calling for a conclusion.

Pl't'f objects to Q. 25 as incompetent, irrelevant, immeterial, calling for a conclusion.

Pl't'f objects to Q. 27 as incompetent, irrelevant, immeterial, calling for a conclusion.

Pl't'f objects to Q. 29 as incompetent, irrelevant, immeterial, calling for a conclusion, and no foundation laid.

Plaintiff objects to question 30 as immeterial, incompetent, irrelevant, and not within the issues of this case.

Plaintiff moves to strike out the answer to question 30 as incompetent, irrelevant, and immeterial, and because it is not pertinent to the issues in this case.

To question 31 plaintiff objects as incompetent, irrelevant, and immeterial, and not within the issues of the case.

Plaintiff objects to Q. 32 as incompetent, irrelevant, and immeterial.

" " " " 33 " " " " "

" " " " 34 " " " " "

" " " " 35 " " " " "

" " " " 36 " " " " "

" " " " 37 " " " " "

STEWART & MUNGER,
Attorneys for Plaintiff.

Journal Entry.

WEBSTER EATON, Administrator of the Estate of John R. Mathews, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

Now, on this 18 day of November, 1896, the same being the ninth day of November, 1896, term of this court, this cause comes on to be heard upon the exceptions of the plaintiff filed November 16, 1896, to the depositions of the defendant, and the same being submitted to the court, and the court, being fully advised in the prem-

29 ises, sustains said exceptions and objections and each of them; to which ruling of the court the defendant at the time duly

And now this cause comes on to be heard upon the exceptions of the defendant, filed November 16, 1896, to the depositions of the plaintiff, and the same being submitted to the court, and the court, being duly advised in the premises, sustains said exceptions and objections and each of them; to which ruling of the court the plaintiff at the time duly excepts.

Now this cause coming on for trial, the jury, composed of H. M. Stanclift, R. H. Marks, Fred Sutter, John W. Leedon, H. F. Lonebrake, H. A. Handershot, I. N. Mothershead, John W. Luce, Ben. W. Gates, C. A. Lawrence, H. E. Sanford, Fred W. Bartels, is duly impaneled and sworn to try this cause and a true verict render according to the evidence adduced under the instructions of the court.

After statements of the counsel to the jury the evidence is adduced.

Plaintiff and defendant rest the cause, and, after arguments of counsel to the jury, it is ordered that court adjourn until tomarrow morning at 9 o'clock.

And afterwards, on the 18 day of November, 1896, there *was* filed in the office of said clerk instructions in the words and figures following, to wit, *to wit:*

In the District Court of Thayer County, Nebraska.

WEBSTER EATON, Administrator, &c., Plaintiff, *vs.* THE CHICAGO, ROCK ISLAND AND PACIFIC Railway Company, Defendant. } Instructions on Behalf of the Plaintiff.

1.

30 The jury is instructed that if you find from the evidence that John R. Mathews was a passenger, being carried on the train of the defendant railway company that was derailed and wrecked near Lincoln, Nebraska, on August 9, 1894, thereby causing the death of said Mathews, and that plaintiff is the administrator of the estate of said Mathews, then you should find for the plaintiff if you find a pecuniary loss from such death has resulted to the next of kin, in this cause, the father.

Given. W. G. H.

Defendants excepts.

2.

If you find the issues in this case in favor of the plaintiff, then your verdict should be in favor of the plaintiff for such sum as the evidence shows will be a just and fair compensation to R. H. Mathews, the father of the deceased, for whose benefit this suit is prosecuted, for the pecuniary injury and damage he has sustained as a result of such death.

Given. W. G. H.

Defendants excepts.

3.

In determining the amount of such damage you may consider the probable duration of life of deceased, John R. Mathews, at the time of the accident in question, also his age, hea-th, habits of industry, sobriety, and economy, and his occupation and capacity to earn money, and also his de-position to pecuniarily assist, care, and provide for his father, so far as the same may appear from the evidence, and in this connection it is proper for you to consider any evidence before you showing to what extent deceased, prior to his death, furnished pecuniary aid to his father; you may also consider the age and probable duration of life of the father at the time of the accident in question and the amount of pecuniary aid and assistance he had a reasonable expectation of receiving from deceased, the amount of pecuniary aid and care which the father might
31 reasonably have expected to receive from deceased had the accident in question not happened is, from the nature of the case, uncertain and not capable of exact proof; it is a question that you must determine by the exercise of sound discretion and judgment, based on a fair and reasonable consideration of all of the evidence, bearing in mind that under the law your verdict cannot exceed $5,000.00.

Given. W. G. H.

Defendant excepts.

4.

In determining the probable duration of the life — John R. Mathews, deceased, and of R. H. Mathews, his father, at the time of the accident, you may consider the Carlisle tables of expectency of life, together with any other evidence in the case bearing on the question.

Given. W. G. H.

Defendant excepts.

In the District Court of Thayer County, Nebraska.

THE STATE OF NEBRASKA, } ss:
Thayer County, }

WEBSTER EATON, Administrator of the Estate of John R. Mathews, Deceased,
v.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railway Company.

Instructions Requested by Defendant.

The court instructs the jury that under the law and evidence in this case your verdict must be *be* for the defendant.

Refused. W. G. H.

Defendant excepts.

2.

The court instructs the jury that in estimating the amount of damages, if any have been proved, you should entirely exclude from

your consideration all loss and damages which the mother of the deceased might have sustained by reason of his death.

Given. W. G. H.

32 1.

If you find for the plaintiff, gentlemen, under the evidence introduced, you will ascertain the amount of the damages by a fair consideration of all the evidence introduced in this case, and will consider it precisely as if the action were one between two individuals, and will not allow your minds to be influenced in any way by any bias, favor, or prejudice for or against either party to this action.

Given by the court on its own motion.

Given. W. G. H.

Defendants excepts.

2.

The jury will take into consideration any offer of evidence which was not received, nor permit any evidence which was excluded during the trial to have any weight in making up your verdict. It is to be left out of consideration as completely as if it did not exist.

Given.

The defendant excepts.

3.

The court instructs the jury that if you find from the evidence that the father of the deceased has not sustained any pecuniary damages by reason of the death of the deceased, then your verdict must be for the defendant.

Given. W. G. H.

And afterwards, on the 19 day of November, 1896, there was filed in the office of the said clerk verdict of jury in words and figures following:

THE STATE OF NEBRASKA, } ss:
Thayer County, }

November Term, A. D. 1896, to wit, November 18, 1896.

WEBSTER EATON, Administrator of the Estate of John R. Mathews, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

We, the jury in this case, being duly impaneled and sworn, do find and say that we find for the plaintiff, and assess his damages at the sum of fifteen hundred dollars ($1,500.00).

J. W. LEEDOM, *Foreman.*

33 And afterwards, on the 19 day of November, 1896, there was filed in the office of said clerk a motion for new trial in the words and figures following, to wit:

THE STATE OF NEBRASKA, } ss:
Thayer County, }

In the District Court of Thayer County, Nebraska.

WEBSTER EATON, Administrator of the Estate of John R. Mathews, Deceased,
v.
THE CHICAGO, ROCK ISLAND AND PACIFIC Railway Company. } Motion for a New Trial.

Comes now the defendant and moves the court to set aside and vacate the verdict of the jury and order a new trial herein for the reasons:

1.

Irregularity in the proceedings of the court, by which the defendant has been prevented from having a fair trial.

2.

Misconduct of the jury and plaintiff, by which the defendant has been prevented from having a fair trial.

3.

Accidents and surprise, against which prudence could not have guarded.

4.

The damages are excessive, appearing to have been given under the influence of passion and prejudice.

5.

The verdict is against the evidence.

6.

The verdict is contrary to the evidence.

34 7.

The verdict is contrary to law.

8.

The verdict is not sustained by sufficient evidence.

9.

Errors of law occurring at the trial, to which the defendant at the time duly excepted.

10.

The court misdirected the jury in matters of law.

11.

The court erred in giving to the jury instruction number one of the instructions given to the jury on the court's own motion.

12.

The court erred in giving to the jury instruction number two of the instructions given the jury on the court's own motion.

13.

The court erred in giving to the jury instruction number one of the instructions given on request of plaintiff.

14.

The court erred in giving to the jury instruction number two of the instruction- given on request of plaintiff.

15.

The court erred in giving to the jury instruction number three of the instructions given on request of plaintiff.

16.

The court erred in giving to the jury instruction number four of the instructions given on request of plaintiff.

17.

The court erred in refusing to give to the jury instruction number one of the instructions requested by defendant.

18.

The court erred in excluding competent and proper evidence offered by the defendant.

35 19. The court erred in allowing plaintiff to introduce testimony, over the objection of defendant, interposed at the beginning of the taking of testimony, that the petition does not state facts sufficient to constitute a cause of action against the defendant and in favor of the plaintiff.

20. The court erred in excluding and refusing to admit the testimony of the witness Harry Foote, showing the condition of the railroad track, bridge, and trestle-work at the place of the wreck shortly after the wreck occurred.

21. The court erred in excluding and refusing to admit the testimony of the witness Harry Foote as to the speed at which the train in question had been run and operated for several months immediately prior to the time of the wreck in question.

22. The court erred in refusin*f* to admit the answer of the witness Harry Foote to questions numbered nineteen to thirty-seven, inclusive, and erred in refusing to admit each of them.

23. The court erred in sustaining the objections of the plaintiff to questions numbered nineteen to thirty-seven, inclusive, in the deposition of Harry Foote, and erred in sustaining plaintiff's objections to each of said questions, erred in excluding the answers to each of said questions.

24. The court erred in excluding, on objection of plaintiff, the answers of the witness Harry Foote to questions numbered nineteen to

thirty-seven, inclusive, and erred in sustaining plaintiff's objection to each of said questions, and erred in excluding each of the answers to each of said questions.

25. The court erred in excluding, on objection of plaintiff, the answers of the witness F. D. Crim to questions numbered one to fifty, inclusive, and erred in sustaining plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions.

26. The court erred in excluding, on objection of plaintiff, the answers of the witness Lewis Ryan to questions numbered one
36 to thirty-three, inclusive, and fifty-two, and erred in sustaining plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions.

27. The court erred in excluding, on objection of plaintiff, the answers of the witness Earnest Shellenberger to questions numbered fifty-three to sixty-seven, inclusive, and erred in sustaining plaintiff's objection to each of said questions, and erred in excluding the answers to each of said questions.

28. The court erred in excluding, on objection of plaintiff, the answers of the witness Fred Foster to the questions numbered eighty-seven to one hundred and three, inclusive, and erred in sustaining plaintiffs objections to each of said questions, and erred in excluding the answers *of* said questions.

29. The court erred in excluding, on objection of plaintiff, the answers of the witness Bert Foster to questions numbered one hundred and five to one hundred and thirty-seven, inclusive, and erred in sustaining plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions.

30. The court erred in excluding, on objection of plaintiff, the answers of the witness W. E. Painter to questions numbered one hundred and sixty-nine to two hundred and five, inclusive, and two hundred and twenty-one to two hundred and twenty-four, inclusive, and erred in sustaining plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions.

31. The court erred in excluding, on objection of plaintiff, the answers of the witness Bert Cambridge to questions two hundred and twenty-five to two hundred and forty-five, inclusive, and erred in sustaining plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions.

32. The court erred in excluding, on objection of plaintiff, the answers of the witness Miss Lettie Siedell to questions numbered two hundred and fifty to two hundred and eighty, inclusive, and
37 erred in sustaining plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions.

33. The court erred in excluding, on objection of plaintiff, the answers of the witness Alonzo Cambridge to questions numbered two hundred and eighty-four to two hundred and ninety-nine, inclusive, and erred in sustaining plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions.

34. The court erred in excluding, on objection of plaintiff, the answers of the witness Earnest Tyrer to questions numbered three hundred to three hundred and twenty-three, inclusive, and erred in sustaining plaintiff's objections to each of said questions, and erred in excluding the answers to each of *of* said questions.

35. The court erred in excluding, on objection of plaintiff, the answers of the witness Walter Sidell to questions numbered three hundred and twenty-four to three hundred and eighty-six, inclusive, and erred in sustaining plaintiff's objection to each of said questions, and erred in excluding the answers to each of said questions.

36. The court erred in excluding, on objection of plaintiff, the answers of the witness William Weems to questions numbered four hundred and seventeen to four hundred and forty-eight, inclusive, and erred in sustaining plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions.

37. The court erred in excluding, on objection of plaintiff, the answers of the witness Wm. Lonsdale to question- numbered four hundred and forty-nine to four hundred and seventy-one, inclusive, and erred in sustaining the plaintiff's objections to each of said questions, and erred in excluding the answers to each of said questions, *and erred in excluding the answers to each of said questions.*

38. The court erred in excluding, on objection of plaintiff, the answers of the witness Fred Lonsdale to questions numbered four hundred and seventy-two to five hundred, inclusive, and erred in sustaining plaintiff's objections to each of said questions, and
38 erred in excluding the answers to each of said questions.

39. The court erred in excluding, on objection of plaintiff, the answers of the witness O. B. Ramey to questions numbered five hundred and one to five hundred and thirty, inclusive; five hundred and ninety-one to five hundred and ninety-five, inclusive; six hundred and fourteen to six hundred and eighteen, inclusive, and six hundred and twenty to six hundred and twenty-one, inclusive, and erred in sustaining the objections of plaintiff to each of said questions, and erred in excluding the answers to each of said questions.

40. The court erred in excluding, on objection of plaintiff, the answers of the witness Mrs. Nettie Collier to questions numbered six hundred and twenty-seven to six hundred and forty-six, inclusive, and erred in sustaining plaintiff's objection to each of said questions, and erred in excluding the answers to each of said questions.

41. The court erred in excluding the evidence of the witness J. H. McKinstry, offered by the defendant, showing the condition and the character of the defendant's railroad track, trestle-work, and bridge and the appliances thereof at the place where it is claimed the deceased was killed and on the evening of August 9, 1894, before the wreck in question occurred and before the train referred to in plaintiff's petition was derailed.

42. The court erred in excluding the evidence of the witness J. H. McKinstry, offered by the defendant, showing the condition of the defendant's railroad track, bridge, and trestle-work and the appli-

ances thereof on the night of the wreck in question and after the train referred to in plaintiff's petition was derailed.

43. The court erred in excluding the evidence of the witness G. J. Bishop, offered by the defendant, showing the condition and character of the defendant's railroad track and bridge at the place where it is claimed the deceased was killed and on either side thereof before and after the derailment of the train referred to in plaintiff's petition and at all times in question.

39 44. The court erred in excluding the evidence of the witness C. H. Cherry, offered by the defendant, showing the manner and the speed at which the train in question was being run and operated at the time it is claimed the deceased was killed, and the manner and speed at which it was customary to operate and run said train over the track in question, at the place in question and at other places, and that he had in his possession at the time of said derailment the passes and money referred to in said offer of his testimony.

45. The court erred in excluding evidence of the witness R. W. Day, offered by the defendant, showing the condition and character of the defendant's railroad at the place where it is claimed the deceased was killed, as alleged in the petition, and on either side thereof, before and after the death of the deceased, and showing that said railroad extended in a straight line in either direction from the place where the train in question was derailed, and that the derailment occurred at a place in said track where there was no curve, and also showing the kind and character of the most skilfully and prudently conducted railroads in the United States, and the kind and character of the material used in the construction and maintenance of the defendant's road at all points in question, and showing the manner in which and speed at which trains on the defendant's railroad and on other railroads were at all times in question run and operated.

46. The court erred in excluding the evidence of the witness Miss Lettie Seidell, offered by the defendant, showing the condition of the defendant's railroad at all places in question within a few minutes after the derailment of the train in question, and showing that the witness found the passes and money referred to in the offer of her testimony at the time and place stated in said offer.

47. The court erred in sustaining the exceptions of the plaintiff, filed November 17, 1896, to the depositions of the witnesses Lewis Ryan, Earnest Shellenberger, Fred Foster, Bert Foster, William E. Painter, Fred Lonsdale, O. B. Ramey, Nettie Collier, Bert Cambridge, Lettie Seidell, Alonzo Cambridge, Earnest Tyrer,

40 Walter Seidell, William Weems, Harry Foote, F. D. Crim, and William Lonsdale, and erred in sustaining the exceptions to each of said depositions, and erred in sustaining plaintiff's said exceptions to each question contained in each of said depositions.

48. The court erred in admitting in evidence the certified copy of letters of administration offered by plaintiff.

49. The court erred in admitting in evidence, over the objection and exception of the defendant, incompetent and improper evidence.

50. The verdict should have been for the defendant.

51. The court should have instructed the jury to return a verdict for the defendant.

52. The court failed to properly instruct the jury with reference to the law of the case.

53. The petition does not state facts sufficient to constitute a cause of action against the defendant and in favor of the plaintiff.

54. The court erred in instructing the jury as follows:

1. "The jury are instructed that if you find from the evidence that John R. Mathews was a passenger, being carried on the train of the defendant railway company that was derailed and wrecked near Lincoln, Nebraska, on August 9, 1894, thereby causing the death of said Mathews, and that plaintiff is the administrator of the estate of said Mathews, then you should find for the plaintiff if you find a pecuniary loss from such death has resulted to the next of kin, in this case, the father." The defendant excepted at the time to each of the errors above assigned.

THE CHICAGO, ROCK ISLAND — PACIFIC RAILWAY COMPANY,
By W. F. EVANS,
L. M. BILLINGSLEY, AND
R. J. GREENE, *Its Attorneys.*

41 *Journal Entry.*

WEBSTER EATON, Administrator of the Estate of John R. Mathews, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

Now, on the 19 day of November, 1896, the same being the tenth day of November, 1896, term of the court, the court convenes pursuant to adjournment, and the court instructs the jury and sends them in charge of the sheriff to their jury-room to deliberate upon their verdict.

Now, on said day, come the jury and return in open court their verdict as follows:

THE STATE OF NEBRASKA, } ss:
Thayer County, }

November Term, A. D. 1896, to wit, November 18, 1896.

WEBSTER EATON, Administrator of the Estate of John R. Mathews, Deceased, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

We, the jury in this case, being duly impaneled and sworn, do find and say that we find for the plaintiff and assesses his damages at the sum of fifteen hundred dollars ($1,500.00).

J. W. LEEDON, *Foreman.*

Now comes the defendant and files its motion, in writing, for a new trial. Now, on the day last aforesaid, said cause coming on for hearing upon the motion of the defendant for a new trial, and the same being submitted to the court, and the court, being fully advised in the premises, overrules said motion and refuses to vacate and set aside the verdict of the jury and grant the defendant
42 a new trail; to which ruling and action of the court in overruling said motion for a new trial and refusing to grant the defendant a new trial the defendant duly at the time excepts, and forty days from the adjournment of the court, *sine dei*, is hereby granted the defendant in which to reduce to writing its exceptions and submit the same to the plaintiff or his attorney of record for examination and amendments.

It is therefore considered and adjudged by the court that the plaintiff to have and recover of and from the defendant the sum of $1,500.00, with interest thereon at the rate of seven per cent. per annum and costs of suit, taxed at $—. To each and every part thereof the defendant duly excepts.

Court adjourned *sine die* for the November term, November 21, 1896.

THE STATE OF NEBRASKA, } ss:
Thayer County, }

I, George W. Wasson, clerk of the district court of the seventh judicial district of Nebraska within and for said county, do hereby certify that the above and foregoing are full, true, and correct copies of the petition, answer, reply, exceptions of plaintiff to depositions and rulings of the court therein, exceptions of defendant to depositions and rulings of the court thereon, the instructions of the court and the exceptions thereto, the instructions requested by plaintiff and given by the court and exceptions thereto, the instructions requested by defendant and refused by the court and exceptions thereto, the motion for a new trial, rulings of the court on motion for new trial, together with proceedings of trial, judgment of the court, and all proceedings had and done in above-entitled cause, wherein Webster Eaton, administrator of the estate of John R. Mathews, is plaintiff and The Chicago, Rock Island and Pacific Railway Company is defendant, as the same appear fully upon the records and files of said court and now in my charge remaining as clerk aforesaid.

I hereby further certify that attached thereto is the orig-
43 inal bill of exceptions in this cause, filed in the 8 day of January, 1897.

In testimony whereof I have hereunto set my hand officially and attached the seal of said court, at Hebron, Nebraska, this 13 day of January, 1897.

GEO. W. WASSON,
[SEAL.] *Clerk of the District —, Thayer County, Nebraska.*

Fee of this transcript, $19.30.

Endorsement: 9150. Chicago, R. I. & P. R'y *v.* Eaton. Transcript. Supreme court of Nebraska. Filed Apr. 16, 1897. D. A. Campbell, clerk.

44 WEBSTER EATON, Administrator, Plaintiff,
v.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

Received of L. W. Billingsley and R. J. Greene, for examination and amendment, a draft of a bill of exceptions in the case of Webster Eaton, adm., *v.* Chicago, Rock Island & Pacific Railway Company, tried in the district court of Thayer county, at the November term, 1896.

Dated December 26, 1896.

STEWART & MUNGER,
Att'ys for Webster Eaton, Adm.

STATE OF NEBRASKA, } ss.
Saline County, }

I hereby certify that the within and foregoing is a true transcript of the evidence, both oral and documentary, adduced or offered on the trial in the above-entitled cause, together with all the objections *ma tho* grounds therefor and the rulings thereon at the regular November, 1896, term of the district court in and for Thayer county, Nebraska.

E. A. CARY,
Official Reporter.

Received this bill of exceptions for examination on this — day of ——, 189–, and returned the same without any amendments to suggest or objections thereto.

—— ——,
Att'ys for —.

45 I hereby certify that the foregoing bill of exceptions contains all the testimony introduced or offered by the plaintiff and defendant on the trial of the above-entitled cause, together with all the objections interposed, the grounds therefor, the rulings thereon, and the exceptions taken thereto, and I hereby approve, sign, and settle the same as the bill of exceptions of said cause in said court on this — day of December, 1896.

—— ——,
Judge of the 7th Judicial District of Nebraska.

In the District Court of Thayer County, Neb.

WEBSTER EATON, Adm'r, etc., Pl't'ff,
v.
THE CHICAGO, ROCK ISLAND AND PACIFIC Co., Def't.

The plaintiff hereby returns the draft of bill of exceptions in the above case and proposes the following amendments thereto:

1. On page 143 insert before the word stipulation the caption to depositions attached to the deposition following, a copy of which caption and notice is hereto attached to this proposed amendments and marked Exhibit K and made a part hereof.

2. On page 265, at the close of Plaintiff's Exhibit I, instead of the words "L. Archman, county judge," etc., make it read "S. T. Cochran, county judge," etc.

3. On page 22, before the words "practice in justice's courts" insert the word "Maxwell's."

4. On page 22, after the words "the expectation of life of one twenty-eight years of age," insert as follows: "Said title page is
46 hereto attached and marked Exhibit 2. as offered in evidence by the plaintiff," and attach Exhibit 2, as shown by Exhibit 2, attached to the proposed amendments.

5. On page 22, just before the words "the book is shown to the jury," insert: "That portion of page 439 as follows: 'Carlisle table of expectation of life:' 'Age, 28; prospect of life, 35.69,' is admitted in evidence."

6. On page 23, insert before the words "practice in justice courts" the words "Maxwell's."

7. On page 23, after the words "of one 56 years of age," insert as follows: "The title page is hereto attached on page 23 and marked Exhibit 2, as offered in evidence by the plaintiff."

8. On page 23, following the words, in ink and pencil, "on page 23 hereof," add as follows: "Portion of page 439, Carlisle table of expectation of life: Age, 56; prospect of life, 16.89." On page 141, after the *court* ending as follows: "John R. Matthews was not on the train," insert as follows: (By defendant's attorneys:) "No, sir;" and add a question-mark to the remarks of the court ending with the words quoted, showing a question asked by the court of defendant's attorneys.

9. On pages 24 and each page following to and including page 125, wherever any offer is made by the defendant of testimony, let there be entered, after the offer and before the ruling of the court refusing and denying each offer, the same objection that appears to the question immediately preceding the offer, as incompetent, imma-
47 terial, and irrelevant.

STEWART & MUNGER,
Att'ys for Plaintiff.

Received the draft of proposed bill of exception- in the above case and proposed 9 amendments thereto, as above set forth, this 2nd day of January, 1897, and agree to said amendments.

L. W. BILLINGSLEY &
R. J. GREENE,
Att'ys — Defendant.

EXHIBIT K.

Caption.

Depositions of sundry witnesses taken before J. E. Ferris, a notary public, duly commissioned and qualified within and for the county of Lancaster, State of Nebraska, on the 10th day of October, in the year A. D. 1896, between the hours of 9 a. m. and 6 p. m. of said day, pursuant to the annexed notice, to be read in evidence in behalf of the plaintiff, in an action pending in the district court of the seventh judicial district of Nebraska in and for Thayer county, in which Webster Eaton, as administrator of the estate of John R. Mathews, deceased, is plaintiff and The Chicago, Rock Island and Pacific Railway Company is defendant.

Appearances: John M. Stewart, for the plaintiff; Robert J. Green, for the defendant.

48

EXHIBIT 2.

A treatise on the powers and duties of justices of the peace, sheriffs, coroners, and constables in the State of Nebraska, with appropriate form, together with a concise statement of the law relating to accord and satisfaction, animals, arbitration and award, arrest and bail, assignment, attachment, bailment, bastardy, contempts, corporations, damages, deeds, domicile, dower, estrays, executors and administrators, filing instruments, forcible entry and detention, fraud, fraudulent conveyances, guaranty, husband and wife, infants, innkeepers, insurance, interest and usury, liens, limitations of actions, marks and brands, marriage, mortgages of chattels, negligence, notaries public, overseers of the poor, partition fences, partnership, payment, principal and agent, principal and surety, promissory notes and bills of exchange, railroads, replevin, sales, set-off and counter-claim, tender and offer to allow judgment to be taken, tenants, time, towns, etc. (police courts), trespass, trustees of an express trust, warehousemen, work and labor, limitation of criminal actions, criminal procedure, etc., etc., etc.

By Samuel Maxwell, one of the judges of the supreme court of Nebraska.

Fifth edition. Revised and enlarged.

Lincoln, Neb.
State Journal Co., law publishers, 1888.

Received the within draft of bill of exceptions & above proposed 9 amendments from Stewart & Munger, att'ys for plaintiff.
49 January 2, 1897.

____ ____,
Att'ys for Def't C., R. I. & P. R'y.

In the District Court of the Seventh Judicial District within and for Thayer County, Nebraska.

WEBSTER EATON, Adm'r, Plaintiff, v. CHICAGO, ROCK ISLAND AND PACIFIC RAILroad Co., Defendants.	Defendant's Bill of Exceptions.

Appearances: Stewart & Monger, Richards & Dinsmore, for plaintiff; W. F. Evans, J. E. Dollman, L. W. Billingsly, R. J. Greene, for df.

Tried before the Hon. W. G. Hastings and a jury.

Be it remembered that on the 18th day of November, 1896, that being one of the days of the regular November, 1896, term of the district court in and for Thayer county, Nebraska, the above-entitled cause came on to be heard before the Hon. W. G. Hastings, judge presiding, and a jury; that on the trial of said cause on said day the plaintiff and defendant, to maintain the issues joined on their respective parts, introduced and offered before the said court and jury the following oral and documentary evidence, and interposed the objections and took the exceptions herewith noted:

50 *Index.*

Plaintiff's evidence.

Objections to depositions of—

J. C. Puetz..... 5
W. G. Roberts..... 6
P. H. Matthews..... 7
J. D. Garmire (evidence)..... 9
R. H. Matthews " 11, 23

Defendant's evidence.

Objections to deposition—

F. D. Crim (Dr.)..... 25
Harry Foote..... 37
Lewis Ryan..... 42
Ernest Shellenbarker..... 48
Fred Foster..... 51
Bert Foster..... 53
Wm. E. Painter..... 58
Bert Cambridge..... 66
Lettie Seidell..... 70
Alonzo Cambridge..... 75
Ernest Tyrer..... 78
Walter Seidell..... 82
William Weems..... 96
William Lonsdale..... 102
Fred Lonsdale..... 106
O. B. Ramey..... 112
Mrs. Nettie Collier..... 121

Evidence.

C. H. Cherry 126
Lettie Seidell 129
J. H. McKinstry 130
R. W. Day 130
Geo. J. Bishop 133
C. J. Bills *et al* 135
..... 140

Plaintiff's depositions.

P. H. Matthews 144
J. C. Puetz 149
Walton G. Roberts 156
G. L. Horn 158

Defendant's depositions.

F. D. Crim 164
Harry Foote 175
Lewis Ryan 184
Ernest Shellenberger 189
Fred Foster 191

51 Defendant's depositions.

Bert Foster 194
William E. Painter 200
Bert Cambridge 208
Lettie Seidell 211
Alonzo Cambridge 214
Ernest Tyrer 216
Walter Seidell 219
William Weems 231
William Lonsdale 235
Fred Lonsdale 238
O. B. Ramey 242
Mrs. Nettie Collier 260

Plaintiff's exhibits.

Exhibit 1 264

52 Jury sworn to try the case.

It is agreed between the parties that the witnesses whose depositions are on file in this case, both for plaintiff and defendant, are non-residents of Thayer county.

The plaintiff now offers in evidence the deposition of J. C. PUETZ, which is hereinafter set out, commencing on page 149.

The objections marked 1 and 2 are sustained by the court; to which the plaintiff excepts.

Objection to question marked 3 as incompetent, immaterial, and irrelevant is sustained; to which the plaintiff excepts.

Defendants' objection to question marked 4 in the above-named deposition is overruled; to which the defendant excepts.

Defendants' objection to question marked 5 in the above-named deposition is overruled; to which the defendant excepts.

Defendants' objection to question marked 6 in the above-named deposition is overruled; to which the defendant excepts.

Defendants' objection to question marked 7 in the above deposition is overruled; to which the defendant excepts.

Defendants' objection to question marked 7 in the above deposition is overruled; to which the defendant excepts.

Defendants' objection to question 9 in the above deposition is overruled; to which the defendant excepts.

Defendants' objection to question marked 10 in the above deposition is overruled; to which the defendant excepts.

Said deposition, with the exception of the questions to which objections are sustained, as stated above, and the answers thereto, is admitted in evidence and read to the jury.

53 The plaintiff offers in evidence the deposition of W. G. ROBERTS (which is set out herein, commencing on page 156), which is read to the jury, after which the defendants move to strike out the evidence given in the deposition of W. G. Roberts as incompetent, immaterial, and irrelevant and indefinite; which motion is overruled by the court and the defendant excepts.

The plaintiff offers in evidence the deposition of G. L. HORN (which is set out herein, commencing on page 158), which is read with the following objections and rulings:

Defendants' objection marked 1 in the deposition above named is overruled; to which the defendant excepts.

Defendants' objection marked 2 in the above-named deposition is overruled; to which the defendant excepts.

Defendants' objection marked 3 in the above-named deposition is overruled; to which the defendant excepts, and their motion to strike out the answer is overruled; to which defendant excepts.

Defendants' motion to strike out the answer marked 4 in the above-named deposition is sustained by the court. Plaintiff- say they have no objection.

Defendants' objection marked 5 in the above-named deposition is overruled; to which the defendant excepts.

Defendants' objection marked 6 in the above-named deposition is overruled; to which defendant excepts.

Defendants' objection marked 7 in the above-named deposition is overruled; to which defendant excepts.

54 Defendants' objection marked 8 in the above-named deposition is overruled; to which defendants except.

Defendants' objection in the above-named deposition marked 9 is overruled; to which defendants except.

Defendants move to strike out that part of the answer in the above-named deposition marked 10 where it says, "We considered him the best man we had on the road." Sustained, and the plaintiff excepts, the grounds of the motion being incompetent, immaterial, and irrelevant, and not responsive to the question.

The plaintiff now offers in evidence the deposition of P. H. MATTHEWS which is set out herein, commencing on page 144.

The defendants' objection to question marked 2 in the above-named deposition as incompetent, immaterial, and irrelevant, and too indefinite so far as "his hearing is concerned," is overruled, and defendant excepts.

Defendants' objection to question marked 2 as incompetent, immaterial, and irrelevant is sustained, and plaintiff excepts.

Defendants' objection to question marked 3 as incompetent, immaterial, and irrelevant is sustained.

Defendants' objection to question marked 4 as incompetent, immaterial, and irrelevant is sustained.

Defendants' objection to question marked 5 as incompetent, immaterial, and irrelevant is sustained.

Defendants' objection to question marked 6 as incompetent, immaterial, and irrelevant is sustained.

Defendants' objection to question marked 7 as incompetent, immaterial, and irrelevant is sustained.

55 Defendants' objection to question marked 8 as incompetent, immaterial, and irrelevant is sustained.

Defendants' objection to question marked 9 as incompetent, immaterial, and irrelevant is sustained.

Defendants' objection to question marked 10 in the deposition of Matthews as incompetent, immaterial, and irrelevant is sustained.

Defendants' objection to question marked 11 in the deposition of Matthews as incompetent, immaterial, and irrelevant is sustained.

Defendant-' objection to question marked 12 as incompetent, immaterial, and irrelevant as relating to "temperance;" that there is no claim made that he was an intemperate man is overruled, and defendant excepts.

Defendants' objection to question 13 in the above named deposition is overruled, and defendant excepts.

Defendants' motion to strike out the answer to question marked 13 in the above-named deposition as too indefinite, and that it do-n't refer to any time, is overruled, and defendant excepts.

Defendant- withdraws their objection to question marked 14 in the above-named deposition, and the answer is read.

Defendants' objection to question marked 15 is sustained, and the plaintiff excepts.

Defendants' objection to the question marked 16 is sustained, and the plaintiff excepts.

Defendants' objection to question marked 17 is sustained, and the plaintiff excepts.

Defendants' objection to question marked 18 is sustained.

56 Said deposition, with the exception of the questions to which objections are sustained, as stated above, and the answers thereto are admitted and read to the jury.

J. D. GARMIRE, — is called as a witness in behalf of the plaintiff, on being duly sworn and examined by Mr. Stewart, testified as follows:

Q. Where do you reside?
A. Hebron, Nebraska.
Q. What is your occupation?

Mr. EVANS: Let us hear his name.

Q. State your name.
A. John D. Garmire.
Q. Where do you reside?
A. Hebron.
Q. What is your business?
A. Lumber and coal.
Q. How long have you been engaged in the business referred to?
A. 13 years.
Q. Were you acquainted with John R. Matthews during his lifetime?
A. Yes, sir.
Q. Where did you know him and during what period of time?
A. I knew him two or three years prior to the time he stopped coming here.
Q. Do you remember the circumstance of the wreck on the Rock Island railroad, south of Lincoln, in August 9, 1894?
57 A. Yes, sir.
Q. How long before that wreck occurred did you see John R. Matthews?
A. The same day.
Q. What time of day?
A. I presume it was about three o'clock. It was the time the Rock Island freight goes east.
Q. Where did you see him?
A. At the depot.
Q. In this city?
A. Yes, sir.
Q. What was his condition as to health at that time?
A. As far as I know, it was good.
Q. Did you have any business transaction with him at that time?

To which the defendants object as incompetent, immaterial, and irrelevant. The objection is overruled by the court; to which the defendant excepts.

A. We figured on a hard-coal deal for that season.
Q. That is the way you came to see him, is it?
A. Yes, sir; it was an agreement that we made prior——

Objected to. Sustained.

Q. What was Mr. Matthews' occupation during the time you knew him?
A. He was salesman for C. B. Havens at that time, and prior to that time I think he was with Pomeroy.

Q. What kind of dealers were they?
A. Hard and soft coal, at Omaha.
Q. Were you acquainted with his ability as a salesman?
A. As much so as any travelling man.
58 Q. State what the character of his business qualifications was.

To which the defendants object as incompetent, immaterial, and irrelevant, and further that the witness has not shown his competency to testify.
The objection is overruled, and the defendant excepts.

A. I considered him a first-class travelling salesman in that line.

No cross-examination.
Witness excused.

R. H. MATTHEWS, — is called as a witness in behalf of the plaintiff, on being duly sworn and examined by plaintiff's counsel, testified as follows:

Q. What is your name?
A. R. H. Matthews.
Q. Where do you reside?
A. Sterling, Kansas.
Q. How long have you resided there?
A. About 21 years.
Q. What relation are you to John W. Matthews, the deceased?
A. He was my son.
Q. What was his occupation?
A. He was a traveling salesman for C. B. Havens & Co., coal company of Omaha, Nebraska.
Q. During what time did he travel for them?
59 A. I do not know just what time he formed his connection with them. He was travelling for the Pomeroy Coal Company of Atchison, Kansas, but I cannot remember just the time he formed his connection with Havens & Co.
Q. Can you remember how long he travelled for them?
A. About three years, I think.
Q. When did you last see him?
A. I saw him either the latter part of May or the first of June preceding his death.
Q. That was in the year 1894?
A. Yes, sir.
Q. How old was John R. Matthews on the 9th day of August, 1894?
A. 28.
Q. How old were you at that time?
A. I was 56.
Q. Have you ever seen or heard from John R. Matthews since the 9th of August, 1894?
A. No, sir; I have not.

Q. What was the condition of John R. Matthews' health the last you knew of him?

A. He was in good health—as good as I ever saw him.

Q. What was the character of his ability as a business man?

A. I do not know of any person that had better ability for business than he had; I had every evidence to believe that.

Q. State, if you know, what John R. Matthews was earning at the time of his death.

60 The defendant objects and cross-examines the witness as follows:

By Mr. EVANS:

Q. Your information is derived entirely from what he said to you or what he wrote you, is it not? All you know about it is what he told you or what you heard?

A. I know it was good.

Q. How do you know it?

A. Only what he told me.

The defendant objects to the evidence on this point as incompetent, immaterial, and irrelevant and not the best evidence. The objection is sustained; to which the plaintiff excepts.

Redirect:

Q. You may state if prior to John R. Matthews' death he furnished you any pecuniary aid or assistance.

To which the defendants object as incompetent, immaterial, and irrelevant and indefinite. The objection is overruled; to which the defendants except.

A. He did.

The defendant moves to strike out the answer as incompetent, immaterial, and irrelevant and indefinite. The motion is overruled; to which the defendants except.

Q. You may state about what such aid or assistance amounted to per year.

61 To which the defendants object as incompetent, immaterial, and irrelevant and too indefinite.

Q. Give the years during which it was furnished.

The defendant's counsel object as incompetent, immaterial, and irrelevant, and too indefinite. The objection is overruled and the defendant excepts.

A. About two hundred dollars.

Q. During what years?

A. Three years prior to his death.

Q. Immediately prior to his death?

A. Yes; immediately prior to his death.

Q. Do you mean two hundred dollars per year?

A. Yes, sir; per year.

Q. What was the character of his aid that he furnished you?

A. It was substantial aid, such as money, clothing, or anything we stood in need of.

Q. You may state whether or not the deceased prior to his death was a hearty, robust man or not.

A. He was.

Q. What were his business habits as to industry and economy?

A. He was very steady, and he was very economical in his business—saving.

Q. What was his conduct towards you in regard to aiding and assisting you?

A. All I can say is that he seemed to anticipate every want of ours. Where it became necessary he would send me aid.

62 The defendant's motion to strike out as not responsive is sustained and the plaintiff excepts.

Q. You may state whether or not he showed any disposition to aid and assist you; if so, in what manner.

To which the defendants object as incompetent, immaterial, and irrelevant, leading, and suggestive and indefinite.

(COURT:) He can state whatever his son actually did.

Defendants except.

Q. Go ahead and state; state what your son did in the way of furnishing you aid.

A. The character of the aid he gave me, you mean?

Q. State the facts.

A. The first aid that I had from him was when a daughter of mine died. I had been to a good deal of expense sending her away to regain her health.

Objected to.

A. Anyway, he sent me aid, and when it came to bury her——

Objected to.

Q. I want to know if he furnished you any money at that time.

A. He did; yes, sir.

Q. You may state what your own pecuniary condition was at the time of the death of your son; whether or not you possessed any property or not.

A. I have a little home.

Q. Is that all?

A. That is all, aside from the little salary I was getting.

Q. Do you have any means of support except that?

A. No, sir; none whatever.

Cross-examined by Mr. EVANS:

Q. Where did you say you lived?

63 A. Sterling, Kansas.

Q. In what county is that?

A. Rice county.
Q. How much of a home have you?
A. Just a house and lot is all, in the city.
Q. In the city of Sterling?
A. Yes, sir.
Q. How long have you lived in Sterling?
A. About 21 years.
Q. What did you say your business was?
A. I have been clerking in a lumber yard.
Q. For how long?
A. About 17 years.
Q. You have had steady employment the last 17 years, have you?
A. I have had steady employment when I was able; there have been times when I was off.
Q. How much time during the last 17 years have you been off so you could not work?
A. I suppose about a year.
Q. During the last 17 years there has been about a year that you could not work?
A. Yes, sir.
Q. You still have employment, have you?
A. Yes; when I am able; lately I have not been able.
Q. State what your family consists of.
A. At the present time?
64 Q. Yes; at the time of this accident.
A. At the time of the accident it was my wife and three brothers living——
Q. You have three brothers?
A. I mean sons.
Q. Your wife and three sons at the time of his death?
A. Yes, sir.
Q. How old were the sons?
A. The youngest is about 24.
Q. What is the next one?
A. His age is 27—that is, at the present time.
Q. And the next one?
A. The next one is the one that was killed.
Q. Did any of your sons live with you at home?
A. One.
Q. The youngest?
A. No, sir.
Q. Which one?
A. The one that is now about 27.
Q. Has he always lived at home?
A. Yes, sir; he has always lived at home; still, some four or five years ago he was away two years.
Q. Since then he has lived at home all the time?
A. Yes, sir.
Q. How long has it been since the deceased, the one that you claim was killed in the wreck, lived at home?
A. It has now been about 7 years.

65 Q. It was about five years before this accident occurred, then?

A. Yes, sir.

Q. When had he been at home prior to the accident?

A. About the first of June.

Q. You say he furnished you with how much money during the last three years?

A. About two hundred dollars a year.

Q. In what way did you keep track of that amount?

A. In counting up the value of the articles he sent me, and the amount of money he sent me.

Q. Did you give him any paper evidencing the amount of money he sent you?

A. I have no itemized account of it.

Q. Did you give him anything to show the amount he sent you?

A. No, sir.

Q. You did not?

A. No, sir.

Q. But your business is such as enables you to make a living for yourself and wife, don't it?

A. It is not just now.

Q. It was when you have work?

A. Yes; when I have work.

Q. And you have had work except for about a year—the last 17 years—have you not?

A. Yes, sir.

Q. So that at the time of this accident and at the time you say your son was killed your business was sufficient to support yourself and wife without any assistance from outside help, was it not?

66 A. Yes; so far as living was concerned.

Q. Well, that is all we get in this world. So that at the time your son was killed, at the time in question, you say the position you had and the salary you were receiving was sufficient for your wife and yourself to live on?

A. Just barely.

Q. Well, it was sufficient, was it not?

A. It kept us from starvation.

Q. Well, it kept you in all the necessities of live, did it not?

A. It is owing to what you call necessities. I do not know whether you would want to live upon what I did.

Q. Well, I expect I could. I am not saying what the necessities were——

A. Bread and water is all that is necessary.

Q. That would be all that is necessary if you did not have anything else?

A. Yes, sir.

Q. I asked you if at the time of the accident in question if your salary was not sufficient for your wife and self to live comfortably on there at Sterling—in a comfortable way?

A. I cannot say that we were altogether comfortable.

Q. That is, comfortable so far as the needs of this world are concerned?

A. We had to limit ourselves.

Q. Well, a man is foolish if he don't limit himself; people who don't limit themselves are usually thrown out of the world; a wise man always limits himself in all things. What do you say, is it not true that at the time of this accident your salary was sufficient

67 for you and your wife to live in comfortable way?

A. It was not. Not with the expenses that was forced upon me it was not.

Q. What were you getting a month?

A. Forty-five dollars a month.

Q. You did not have any house rent to pay, did you?

A. No, sir.

Q. How large a town is Sterling?

A. About the same size as this, about two thousand inhabitants.

Q. Do you tell the court and jury that you could not live, you and your wife could not live, at that time comfortably on forty-five dollars a month?

A. As far as living was concerned, but I had expenses forced upon me, sickness, and so on.

Q. What sickness?

A. I spoke of my daughter's death.

Q. When was that?

A. That was about a year and a half prior to the death of my son.

Q. You see you do not notice my question. I do not like to be contentious about this. I asked you if at the time of the death of your son, at the time of this accident, was not your salary that you were receiving sufficient for you and your wife to live there at home in comfort?

(COURT:) I think that question has been asked a number of times.

A. If you will let me, I will state the facts.

68 Q. Answer the question.

A. It was not.

Q. Then you mean to say you and your wife could not live in comfort on forty-five dollars a month and house rent?

A. If I am allowed to bring in——

Q. Answer the question.

(COURT:) That is argumentative. He does not have to answer that.

(DEFENDANT'S COUNSEL:) I do not believe I want any other facts.

(COURT:) Then we will stop.

Defendant excepts.

Q. Did you at any time receive any assistance or aid from your other sons?

A. No, sir.

Q. He is the only one that ever aided you, is he?

A. Yes, sir; he is the only one that had the ability to aid me.

The plaintiff now offers in evidence the certified copies of the letters of administration in the matter of the estate of John R. Matthews. Same is marked Exhibit 1. The defendants object to the same as incompetent, immaterial, and irrelevant, and for the further reason it is not properly certified to, that it is not the best evidence, and not a certified copy of the record. The objection is overruled; to which the defendants except. Said Exhibit 1 is admitted in evidence and is set out on pages 264 and 265 hereof.

69 Redirect examination:

Q. State what the condition of your health was at the time of your son's death.

To which the defendants object as incompetent, immaterial, and irrelevant. The objection is overruled; to which the defendants except.

A. It was good.

The plaintiff now offers in evidence so much of page 439 of the book, the title page of which is "Treatise of the powers and duties of justices of the peace, sheriffs, coroners, constables in the State of Nebraska." We offer the entire title page to further identify the book commonly known as "Practice in the justice courts," as shows the Carlyle table for the expectation of life of one twenty-eight years of age.

Defendants object as incompetent, immaterial and irrelevant, and no proper foundation laid for the introduction of the same, and it is not shown that the table is correct. The objection is overruled, and the defendants except. The book is shown to the jury.

The plaintiff offers in evidence so much of page 439 of the book, the title page of which is "Treatise of the powers and duties of justices of the peace, sheriffs, coroners, and constables in the State of Nebraska." They offer the entire title page to further identify the book commonly known as "Practice in the justice courts" as shows the Carlyle table for the expectation of life of one 56 years of age.

70 The defendants object to the same as incompetent, immaterial, and irrelevant and not the proper foundation laid, and it is — shown that the table is correct. The objection is overruled, and the defendants except to the ruling of the court. The same is admitted and is set out on page 23 hereof.

R. H. MATTHEWS is recalled for further cross-examination by Mr. Evans:

Q. Is the mother of the deceased whose death is complained of in this action—your wife—living or dead——

(No answer.)

Q. State whether or not the mother of the deceased, your wife, is living or dead at this time.

A. She is not.

Q. Then you have no wife now?
A. No, sir.
Q. How long has she been dead?
A. She has been dead a year and a half, at least, or nearly so.

Plaintiff rests.

The defendant now offers in evidence the deposition of Dr. F. D. CRIM, which is set out herein, commencing on page 164, who was coroner of the county of Lancaster, and on the night of the wreck he made an examination of the railroad track and everything connected with the same at that time; to which the plaintiff objects, as appears from the written objections on file in this court.

71 (COURT:) On counsel for defendant stating that the deposition relates simply to the condition of the track, bridge, and trestle, the management and care of the same, the objections are sustained, which are herewith inserted in full at counsel's request.

Plaintiff objects to question 1 in Doctor F. D. Crim's deposition as incompetent, immaterial, and irrelevant, which is sustained, and defendant excepts, and defendant offers to prove that the witness Crim, in response to question 1, would answers as stated in his deposition, "F. D. Crim, Hot Springs, N. C., physician and surgeon." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 2 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts, and defendant offers to prove that the answer would be — stated in the deposition in reply to question 2, as follows: "Lived at Lancaster, Nebraska, and was engaged in the practice of medicine and surgery." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 3 as incompetent, immaterial, and irrelevant; which objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 3, as follows: "I was coroner of Lancaster county." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 4 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts, and defendant offers to prove that the answer would be as stated in the
72 deposition in reply to question 4, as follows: "I remember a wreck five miles southwest of Lincoln, Nebraska." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 5 as incompetent, immaterial, and irrelevant. Objection sustained. Defendaut excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 5, "Chicago, Rock Island and Pacific." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 6 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition — reply to

question 6, as follows: "I did." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 7 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition, as follows: "I started for the wreck a few minutes after eleven, and reached the wreck about twelve or a few minutes afterwards on the night of August 10th, 1894." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 8 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 8, as follows: "I saw an injured man being car-
73 ried into one of the hotels. Inquiring of the patrol-driver as to how the injury had occurred, he said a bad wreck had occurred at a trestle on the Rock Island, and I ought to go there at once. I had my horse hitched up and drove to the wreck as soon as I could." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 9 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 9, as follows: "It was." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 10 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 10, as follows: "I did." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 11 as incompetent, immaterial, and irrelevant, and no foundation laid, and calling for a conclusion. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 11, as follows: "I approached the trestle from the east side. It was then on fire. About 150 or 200 feet off the trestle was a flaming mass. To the northwest side of the trestle lay the remains of a burned train, the wood-work being at that time entirely consumed, and the irons of the train lay on a flaming bed of coals. I descended on the same side of the trestle, crossed under the trestle,
74 went across the Union Pacific and B. & M. tracks, ascended the dump on the southwest or far end of the trestle. I then walked on the trestle on that side at a distance of four or five ties from the dump. The rail on the southeast side of the trestle was loosened and set aside about ten inches. The far end of the rail was still attached by angle bars to the next rail. I proceeded along the track to the northeast end of the rail. The foot of the angle bar which held the loose rail to the sound rail had been cut off at the corner attached to the loose rail as if done by the flange or tread of the wheels. At this point the derailed train had swerved to the north, as shown by the print of the wheels and flanges on the ak ties. I followed the line of the wheels on the ties as far as the heat

would allow me, but could not reach the point at which the train had left the trestle. I then returned, examining the northwest rails. There was nothing wrong with these rails until I reached the point opposite the attachment of the loose rail with the sound rail. At this point the wheels on the north side of the track had climbed or jumped over the rail, taking the outside of the rail. Following the rail—the first rail on the bridge from the southwest end—I found one or two spikes removed and one which the bar had evidently slipped and could not be drawn. That was all I noticed wrong with that rail. I then crossed over to examine the loose rail more carefully. The angle bars holding the end nearest the dump were gone. All loose spikes were gone. On the side where the rail had originally set opposite the spikes were smooth indentations, looking as if they had been recently made by some steel or iron instru-
75 ment, such as would be made by a bar under great pressure. These indentations were free from dust, shining, and distinct. I examined them by the light of the burning bridge and by matches struck for the purpose. I then went on the dump and looked along the line of the rail to see the direction in which the flanges of the wheels first struck the ties of the bridge. They were in lone with the position a wheel should occupy on the sound rail approaching the bridge. The end of the loose rail was on or near the fourth bridge tie proper. The first tie that was indented by the flanges was No. 7 of the bridge tie proper. The indentation in this tie was not very deep. The 8th tie was deeply indented, and a spike which had held the inside of the rail was deeply buried in the timber. The line of the flange on the ties ran nearly straight on a line with the rail until the mark reached the junction of the loose rail with the sound rail, at which point the marks ran diagonally toward the northwest side of the trestle, as before described. I then went back on the dump sixty or eighty feet and examined the dump ties and rails to see if there was any mark of the train being off the track or having any part thereof dragging. There was nothing to show that anything was wrong until the 4th tie proper of the bridge was reached, or the point at which the first south rail of the bridge had been displaced." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 12 as incompetent, immaterial, and irrelevant and calling for a conclusion. Objection is sustained. Defendant excepts, and defendant offers to prove that the an-
76 swer would be as stated in the deposition in reply to question 12, as follows: "The purpose in making this examination was to determine in my mind—and if possible for future investigation—the cause of the wreck. It was my official duty to make such examination. The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 13 as incompetent, immaterial, and irrelevant and calling for a conclusion of the witness. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 13, as follows: "By the loose rail I mean the first rail on the southwest end of the bridge on the

southeast side of the track, or the right-hand rail as you approach the trestle from the southwest. By the sound rail I refer to the next rail from the approach from which the spikes had not been drawn." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 14 as incompetent, immaterial, and *and* irrelevant and calling for a conclusion. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 14, as follows: "I do." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 15 as incompetent, immaterial, and irrelevant and calling for a conclusion. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 15, as follows:

77 "There were indications opposite several spike-holes on the outer side of the south rail similar to those which would be made by those of a claw-bar. There was also a similar indentation opposite the spike on the northwest side, which had apparently slipped in the process of drawing the eighth tie." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 16 as incompetent, immaterial, and irrelevant and calling for a conclusion of the witness. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition, as follows: "Number 7 from the southwest end of the bridge or the 3rd tie from the end of the rail which projected from the end of the dump on to the trestle." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 17 as incompetent, immaterial, and irrelevant and calling for a conclusion of the witness. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 17, as follows: "It was at the inn*d*er side of the line of the rail, in the position that the flanges of the wheels would be in in passing straight from the sound rail on to the ties." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 18 as incompetent, immaterial, and irrelevant and calling for a conclusion. The objection — sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 18, as follows: "The first right-hand rail on the south as you approach the bridge from the southwest

78 was set about ten inches to the outside and running diagonally to this point, where it was still fastened to the second rail by the angle bars." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 19 as incompetent, immaterial, and irrelevant and calling for a conclusion. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 19 in the deposition, as follows: "There were none." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 19½ as incompetent, immaterial, and irrelevant and calling for a conclusion. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 19½, as follows: "I did not: I looked for them, but did not find them." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 20 as incompetent, immaterial, and irrelevant and calling for a conclusion. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 20, as follows: "I did not see anything which indicated anything having been broken." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to quesuon 21 as incompetent, immaterial, and irrelevant and calling for a conclusion. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 21, as follows:
79 "I did not see any." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 22 as incompetent, immaterial, and irrelevant and calling for a conclusion. The objection — sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 22: "The holes were nearly square, as if the spikes had been drawn and not crowded out." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 23 as incompetent, immaterial, and irrelevant and calling for a conclusion. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 23, as follows: "They had the appearance of being recently drawn." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 24 as incompetent, immaterial, and irrelevant and calling for a conclusion of the witness. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition of the witness, as follows, in reply to question 24: "They were sound, new ties—that is, comparatively new; browned by exposure, but perfectly sound." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 25 as incompetent, immaterial, and irrelevant and calling for a conclusion. Objection is sustained. Defendant excepts and offers to prove that the answer would
80 be as stated in the deposition in reply to question 25, as follows: "The ties were made of oak, sawed square or nearly so." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 26 as incompetent, immaterial, and irrelevant and calling for a conclusion. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 26, as follows: "I ex-

amined as far toward the burnt portion as I could walk. Every one was sound except one about fifty feet from the end of the bridge, which had one corner slivered off about an inch wide at its widest part. That had been recently broken off by the train spoken of." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 27 as incompetent, immaterial, and irrelevant and calling for a conclusion. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 27, as follows: "Perfectly sound." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 28 as incompetent, immaterial, and irrelevant and calling for a conclusion. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in reply to question 28, as follows: "Only one." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 29 as incompetent, immaterial, and irrelevant and calling for a conclusion. The objection is sustained.

81 The defendant excepts and offers to prove that the answer would be as stated in reply to question 29 in the deposition, as follows: "I had." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 30 as incompetent, immaterial, and irrelevant and calling for a conclusion of the witness. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 30, as follows: "I examined the trestle between the hours of nine and ten on the following morning with the jury, which I had summoned for the purpose of examining into the cause of the wreck." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 31 as incompetent, immaterial, and irrelevant and calling for a conclusion. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 31 in the deposition, as follows: "I do not think I gained any material points at that time." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 32 as incompetent, immaterial, and irrelevant and calling for a conclusion. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 32, as follows: "On the morning of the 10th, about 10 o'clock, I had the sectionmen remove the tie No. 8 from the southwest end of the bridge." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 33 as incompetent, immaterial,

82 and irrelevant, calling for a conclusion. The objection is sustained. The defendants except, and offers to prove that the answer would be as stated in the deposition in reply to question 33, as follows: "I did." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 34 as incompetent, immaterial, and irrelevant and calling for a conclusion. The objection is sustained. Defendant excepts and offers to prove that the answer would be the same as stated in the deposition in reply to question 34, as follows: "It was placed on a Union Pacific engine and in the custody of Walton G. Roberts." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 35 as incompetent, immaterial, and irrelevant and calling for a conclusion. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 35, as follows: "Taken to his undertaking rooms, and from there to the court-house of Lancaster county, where it was kept in the vault of the county surveyor until produced at the coroner's inquest, and later appeared in the district court." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 36 as incompetent, immaterial, and irrelevant and calling for a conclusion. Objection is sustained.

83 Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 36, as follows: "Wrote my name on it with a pencil." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 37 as incompetent, immaterial, and irrelevant and calling for a conclusion. The objection is sustained. Defendant excepts and offers to prove that the answer would be — stated in the deposition as follows: "I was." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 38 as incompetent, immaterial, and irrelevant and calling for a conclusion of the witness. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in the deposition as follows: "They were sound." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 39 as incompetent, immaterial, and irrelevant and calling for a conclusion of the witness. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition as follows: "Morning of the second day after the wreck." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 40 as incompetent, immaterial, and irrelevant and calling for a conclusion of the witness. The objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 40 as follows: "I tried it on the nuts and it fitted the nuts exactly." The offer is denied and refused by the court; to which defendant excepts.

84 Plaintiff objects to question 41 as incompetent, immaterial, and irrelevant and calling for a conclusion of the witness. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 41, as follows: "I kept it in my possession under lock and key, and

allowed no one to touch the screw until it passed from my possession into the hands of the district court at the time it was given in evidence on the first trial of the case of the State of Nebraska against G. W. Davis." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 42 as incompetent, immaterial, and irrelevant and calling for a conclusion of the witness. Objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 42, as follows: "I was." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 43 as incompetent, immaterial, and irrelevant and calling for a conclusion. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in reply to question 43 in the deposition, as follows: "As coroner of Lincoln county, I had the trial made to determine whether a rail similar to the one on the bridge, fastened with similar spikes to similar ties, could be removed with the implements in my possession, said to have been found at the place of the wreck, and the time required for an unskillful hand to remove the same."
85 The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 44 as incompetent, immaterial, and irrelevant and calling for a conclusion. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition as follows: "As I timed it, twenty-one minutes and some seconds." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 45 as incompetent, immaterial, and irrelevant and calling for a conclusion of the witness. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 45, as follows: "I placed the bar in position to draw the spike on the tie No. eight, which I removed from the bridge, and which showed by the fresh marks on the head of the spike that a recent unsuccessful attempt to remove the spoke had been made, and the heel of the bar fitted the indentations in the tie exactly." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 46 as incompetent, immaterial, and irrelevant and calling for a conclusion of the witness. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in the deposition as follows: "I did." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 47 as incompetent, immaterial, and irrelevant and calling for a conclusion of the witness. The objection is sustained. The defendant excepts and offers to prove
86 that the answer would be as stated in reply to question 47, as follows: "The Rock Island bar had a longer heel of different curve, and did not fit the indentations at all." The offer is denied and refused by the court; to which defendant excepts.

All of said deposition was excluded.

The defendant offers in evidence the deposition of HARRY FOOTE (which is hereinafter set out, commencing on page 175), who was the rear brakeman on the train in question at the time it was wrecked or derailed at the time in question in this case. The plaintiff offers no objection to the first 18 questions in said deposition. The first 17 questions in said deposition are read. Plaintiff objects to question 18 as incompetent, immaterial, and irrelevant, and objection is sustained; to which the defendant excepts and offers to prove that the answer would be as stated in the deposition of the witness Foote in reply to question 18, as follows: "About 45 miles an hour." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 19 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be, as stated in the deposition, as follows: We have run that fast or faster ever since the run has been on—something like a year and six months. The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 20 as incompetent, immaterial, and irrelevant; which objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the
87 deposition in reply to question 20, as follows: "It was the usual speed." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 21 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would — as stated in the deposition in reply to question 21, as follows: "Sitting on the rear seat of the rear car." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 22 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 22, as follows: "Of combination car, first-class coach, and engine and tender." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 23 as incompetent, immaterial, and irrelevant; which objection is sustained; to which the defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 23, as follows: "Yes." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 24 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to the question 24, as follows: "Tender and both cars connected with the air." The offer is denied and refused by the court; to which defendant excepts.

88 Plaintiff objects to question 25 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposi-

GENERAL OF THE ARMY—Continued.
Appropriation for clerk to the 55, 1888
Appropriation for clerk to the retired 23, 1887; 55, 1888; 25, 1889
Grade revived 39, 1888
To be retired without reduction in pay and allowances 72, 1882
(*See* UNIFORM.)

GENERAL ORDERS:
Distribution ..... Cir. 25, 1900
General court-martial orders to be kept in a series separate from ..... Cir. 1, 1883
Names of three most distinguished students in military science and tactics at colleges to be published in 15, 1890; 26, 1891
Opinions obligatory on military courts are published in 3, 1881
Proceedings of general courts-martial to be published in, in certain cases. 29, 1894
Result of competition for Nevada trophy to be published in 45, 1881
Retirement of officers not to be published in ..... Mem. A. G. O., July 24, 1896
Series—
1863, No. 100, addition to 3, 1892
1869, No. 76, section 1, paragraph 4, modified 5, 1881
1876, No. 97, first paragraph of sections 1 and 9, part 3, modified 6, 1881
1877, No. 95, modified 62, 1881
1878, No. 24, concluding sentences of sections 24 and 25, paragraph 1, rescinded 19, 1881
1878, No. 59, revoked 73, 1881
1878, No. 71, amended 26, 1894
1879, No. 4, last clause, revoked 68, 1881
1879, No. 78, amended, paragraph 2, revoked 90, 1886
1879, No. 101, revoked 73, 1881
1880, No. 40, amended 33, 1881
1880, No. 69, paragraphs 10 and 16 suspended 57, 1881
amended 105, 1884
1880, No. 84, paragraphs 4 and 5 rescinded 41, 1881
1881, No. 2, part of, rescinded 14, 1881
1881, No. 4, amended 52, 1881
1881, No. 7, revoked 54, 1881
1881, No. 14, amended 32, 1881
1881, No. 16, revoked 70, 1887
1881, No. 26, revoked 18, 1882
1881, No. 44, defines meaning of 70, 1881
substitution for 53, 1882
1881, No. 45, paragraph 3, modified 52, 1882
1881, No. 50, addition to 37, 1882
section 2, paragraph 5, modified 80, 1882
part of, discontinued 14, 1883
paragraph 4, amended 33, 1885
section 1, paragraph 5, modified 45, 1885
section 2, paragraph 5, amended 101, 1885
1881, No. 51, suspended ..... Cir. 1, 1883
1881, No. 54, revoked 104, 1884
1881, No. 61, amended 69, 1881
1881, No. 63, revoked 73, 1887
1881, No. 73, revoked 104, 1882
1881, No. 93, amended 2, 1888
1882, No. 1, revoked 8, 1887
1882, No. 24, amended 3, 1900
1882, No. 30, rescinded 65, 1886
1882, No. 34, modified 81, 1883
modification revoked 98, 1883
1882, No. 37, amended 14, 1883
1882, No. 44, revoked 7, 1889
1882, No. 68, revoked 120, 1882
1882 No. 71, revoked 19, 1883
1882 No. 78, paragraph 4, revoked 105, 1882
1882 No. 86, amended 131, 1882
1882 No. 91, amended 118, 1882
1882, No. 101, modified 55, 1883
1882, No. 128, amended ..... Cir. 1, 1883
part of, annulled ..... Cir. 10, 1885

GENERAL ORDERS—Continued.
Series—
1882, No. 131, amended ..... Cir. 1, 1883
revoked 116, 1885
1883, No. 14, part of paragraph 3, revoked 34, 1885
1883, No. 31, substitution for 5, 1890
1883, No. 34, amended 41, 1883
1883, No. 35, modified 3, 1884
1883, No. 43, revoked 36, 1887
1883, No. 66, paragraph 1, revoked 90, 1883
1883, No. 69, revoked 121, 1884
1883, No. 81, revoked 98, 1883
1883, No. 100, addition to 117, 1885
substitution for 5, 1888
1883, No. 105, defined ..... Cir. 2, 1884
1884, No. 32, paragraph 1, amended 120, 1885; 11, 46, 1886
1884, No. 56, amended 85, 1884
1884, No. 59, revoked 67, 1884
1884, No. 92, amended 139, 1884; 23, 1885
1884, No. 104, modified 47, 1885
1885, No. 23, amended 82, 1885
1885, No. 55, paragraph 4, revoked 21, 1888
republished and amended 43, 1889
1885, No. 73, defined ..... Cir. 10, 1885
1885, No. 89, part of, stricken out 17, 1887
superseded 77, 1892
1885, No. 97, amended 102, 1885
1885, No. 121, modified 25, 1886
1885, No. 124, amended 16, 1886
1885, No. 127, revoked 5, 1887
1886, No. 16, paragraph 2, revoked 56, 1886
amended 15, 1887
1886, No. 25, modified 83, 1886
1886, No. 36, amended 98, 1888
substitution for 60, 1892
1886, No. 68, amended 96, 1886
1886, No. 86, revoked 56, 1889
1887, No. 24, revoked 92, 1888
1887, No. 45, paragraph 4, amended 64, 1887
1887, No. 50, revoked 82, 1888
1887, No. 56, paragraph 33, amended 47, 1888
1888, No. 5, republished and amended 131, 1890
1888, No. 12, revoked 20, 1896
1889, No. 7, amended 20, 1889
1889, No. 18, revoked 74, 1891
1889, No. 37, defined ..... Cir. K, 1889
1889, No. 38, revoked 76, 1889
1889, No. 46, paragraph 1, amended 53, 1889
1889, No. 51, superseded 85, 1889
1889, No. 65, amended 35, 1893
1889, No. 68, amended 70, 1889
1889, No. 70, amended 83, 1890
1890, No. 5, substitution for 72, 1891
1890, No. 13, part of revoked 24, 1892
1890, No. 18, amended 57, 1893
1890, No. 57, paragraph 1, amended 62, 1890
1890, No. 80, amended 96, 1891; 32, 1892
1890, No. 81, amended 96, 1891
paragraph 2, amended 32, 1892
amended 17, 1893
1890, No. 128, amended 37, 1893
1890, No. 131, amended 4, 1891; 78, 1892
1890, No. 132, modified 14, 1895
1890, No. 137, amended 12, 1894
1891, No. 21, defined 92, 1891
part of revoked 25, 1894
amended 16, 1895

GENERAL ORDERS—Continued.
Series—
1891, No. 59, paragraph 1, amended 51, 1894
1891, No. 80, paragraph 1, amended 6, 1893
sections 1 and 2, paragraph 2, amended 23, 1895
1891, No. 85, rescinded 91, 1891
amended 18, 1892
1891, No. 96, amended 32, 1892
paragraphs 1 and 2, defined ..... Cir. 2, 1892
1892, No. 29, provisions of extended 24, 1893
1892, No. 40, modified 32, 1893
1892, No. 60, amended 40, 1893; 5, 1894; 26, 1897
section 12, amended 197, 1899
1892, No. 66, amended 76, 1892
1892, No. 77, revoked 2, 1898
1892, No. 79, amended 32, 1899
1892, No. 80, paragraph 2, supplemented 123, 1900
1893, No. 16, amended 33, 1893
1893, No. 19, amended 28, 1893
1893, No. 35, amended 68, 1894
1893, No. 63, revoked 89, 1893
1894, No. 12, amended 47, 1894
1894, No. 20, paragraph 2, amended 25, 1894
1894, No. 34, paragraph 3, modified 64, 1894
1895, No. 15, paragraph 14, amended 35, 1895
1895, No. 16, amended 36, 1896; 16, 1898
1895, No. 22, amended 47, 1895
1895, No. 34, paragraph 3, modified 2, 1896
1895, No. 40, rescinded 18, 1896
1895, No. 41, rescinded 55, 1895
1895, No. 46, revoked in part 69, 1899
1895, No. 49, paragraph 2, modified 56, 1895
paragraph 2, defined ..... Cir. 4, 1897
1895, No. 55, defined ..... Cir. 4, 1897
1895, No. 59, modified 15, 1896
1896, No. 2, modified 18, 1897
1896, No. 4, paragraph 1, modified 32, 1896
1896, No. 9, revoked 60, 1897
1896, No. 14, paragraph 1, revoked 1, 1899
1896, No. 27, paragraph 2, superseded 33, 1896
amended 93, 1900
1896, No. 31, amended ..... Cir. 8, 1896
modified 56, 1897
1896, No. 32, modified 17, 1897
1896, No. 33, supplemented 113, 1899
amended 93, 1900
1896, No. 37, paragraph 2, amended 62, 1898
1896, No. 41, modified 17, 1897
amended 4, 1898
paragraph 7, amended 70, 1898
1896, No. 50, not issued 50, 1896
1897, No. 9, revised 52, 1897
1897, No. 18, discontinued 18, 1898
amended ..... Cir. 42, 1899; 11, 1900
1897, No. 22, amended 92, 1899
1897, No. 40, amended 83, 1900
1897, No. 46, amended 78, 1898
1897, No. 60, amended 39, 1900
1897, No. 68, paragraph 7, amended 30, 1900
1898, No. 16, supplemented 88, 1900
1898, No. 18, revoked 63, 199, 1899
1898, No. 21, paragraph 1, revoked 23, 1900
1898, No. 36, paragraph 2, amended 98, 211, 1899
1898, No. 39, paragraph 2, amended 112, 1898
1898, No. 41, revoked 67, 1898
1898, No. 45, paragraph 1, amended 56, 1900
1898, No. 51, amended 112, 1898

GENERAL ORDERS—Continued.
Series—
1898, No. 58, provisions extended 178, 1898
paragraph 1, revoked 86, 1899
1898, No. 65, amended 53, 1899
1898, No. 71, amended 47, 1899
1898, No. 81, part of paragraph 10, rescinded 49, 1900
1898, No. 82, paragraph 1, revoked 86, 1899
1898, No. 86, paragraph 1, amended 155, 1898
1898, No. 98, revoked 152, 1899
1898, No. 110, paragraph 7, amended 5, 1899
paragraph 2, amended 53, 1899
1898, No. 112, amended 134, 1899
1898, No. 114, provisions extended 173, 1898
revoked 114, 1899
1898, No. 116, provisions extended 136, 1898
revoked 125, 1899
1898, No. 118, amended 12, 1899
1898, No. 119, amended 53, 1899
1898, No. 124, amended 130, 1898
section 14, amended 164, 1898
amended 169, 1898
1898, No. 125, amended 129, 1898
1898, No. 130, amended 139, 155, 1898
paragraph 1, amended 170, 1898
paragraph 7, revoked 178, 1898
1898, No. 136, revoked 125, 1899
1898, No. 139, paragraph 2, amended 155, 1898
1898, No. 141, defined ..... Cir. 9, 1900
1898, No. 150, amended 169, 1898
1898, No. 154, revoked 165, 1898
1898, No. 158, amended 211, 1899
1898, No. 163, revoked in part 177, 1898
1898, No. 167, revoked 100, 1900
1898, No. 178, paragraph 3, amended 3, 1899
paragraph 1, and part of paragraph 3, revoked 86, 1899
75, 1900
1898, No. 179, amended 113, 1900
1898, No. 180, paragraph 1, revoked 5, 1899
1898, No. 180, paragraph 2, amended 141, 1899
1898, No. 185, amended 15, 98, 1899
1898, No. 190, amended 194, 1899
1898, No. 194, revoked 14, 1899
1899, No. 1, paragraph 1, revoked 119, 122, 1900
1899, No. 7, amended ..... Cir. 18, 1900
defined ..... Cir. 24, 1900
provisions extended 203, 1899
1899, No. 9, paragraph 2, amended 118, 1900
1899, No. 12, paragraph 2, amended 76, 1900
1899, No. 13, provisions extended 43, 1899
1899, No. 15, amended 86, 1899
1899, No. 20, suspended in part 41, 1900
1899, No. 21, amended 137, 1900
1899, No. 24, modified 24, 1900
1899, No. 31, paragraph 1, revoked 204, 1899
1899, No. 34, paragraph 1, revoked 53, 1899
paragraph 2, amended 152, 1899; 17, 1900
1899, No. 37, amended 118, 1900
1899, No. 45, paragraph 2, amended 112, 1899
1899, No. 68, amended 74, 1900
1899, No. 80, amended 83, 1900
1899, No. 90, amended 45, 1900
1899, No. 92, paragraph 2, amended 101, 1899
1899, No. 95, paragraph 2, revoked 26, 1900
1899, No. 96, paragraph 5, amended 211, 1899
1899, No. 98, paragraph 2, amended 89, 1900
paragraph 3, amended 2, 83, 1900
1899, No. 106, amended

GENERAL ORDERS—Continued.
Series—
1899, No. 111, amended 83, 1900
1899, No. 116, defined ..... Cir. 31, 1900
1899, No. 118, amended 35, 1900
1899, No. 119, amended 48, 1900
1899, No. 125, paragraph 2, amended 137, 182, 1899
1899, No. 128, amended 9, 1900
1899, No. 129, paragraph 1, amended 204, 1899
page 2, Ballistics, amended 169, 1899
1899, No. 132, revoked 169, 1899
1899, No. 134, paragraph 1, amended 73, 1900
1899, No. 137, amended 182, 1899
1899, No. 140, supplemented ..... Memorandum, July 19, 1900
1899, No. 143, not issued 143, 1899
1899, No. 149, paragraph 4, amended 23, 1900
1899, No. 152, paragraph 1, amended 16, 1900
1899, No. 153, paragraph 3, decision ..... Cir. 45, 1900
1899, No. 164, amended 179, 1899
1899, No. 178, paragraph 1, amended 183, 1899
1899, No. 180, paragraph 2, amended 199, 1899
1899, No. 192, paragraph 2, modified 12, 1900
1899, No. 211, paragraph 2, revoked 51, 1900
1900, No. 11, amended 88, 1900
1900, No. 12, paragraph 3, amended 22, 1900
1900, No. 17, amended 59, 1900
1900, No. 40, amended 54, 1900
1900, No. 43, corrected 73, 1900
1900, No. 68, rescinded 72, 1900
1900, No. 90, amended 93, 96, 1900
1900, No. 104, amended 117, 1900
1900, No. 111, amended 131, 1900
1900, No. 119, amended 122, 1900

GENERAL ORDERS AND CIRCULARS:
Distribution; number of copies furnished to and required from the several military departments, and organizations ..... Cirs. 25, 34, 1900

GENERAL PRISONERS. (*See* PRISONERS.)

GENERAL SERVICE CLERKS AND MESSENGERS:
Act for enlistment, etc., of 54, 1886
Act for enlistment, etc., of, repealed 32, 1894
Additional pay for previous service ..... Cir. 8, 1886
All, to be discharged, etc 43, 1886
Appropriation for extra-duty pay 28, 1885
Appropriations for pay 47, 1886; 12, 1887; 75, 1888; 26, 1889; 69, 1890; 27, 1891; 49, 1892; 20, 1893
Certificate of merit ..... Cir. 9, 1886; Cir. 20, 1893
Civilian clerks provided in lieu of, in War Department and its bureaus .. 90, 1882
Commutation of rations ..... Cir. 10, 1886
Control of, on duty in offices of Inspector-General 76, 1891
Distribution 65, 1891
Extra-duty pay ..... Cir. 11, 1885
How mustered 76, 1891
Inspectors-general authorized to have 47, 1885
Medical attendance ..... Cir. 6, 1888
Medical directors to be furnished with ..... Cirs. 8, 9, 1886
Number allowed, etc 7, 54, 1881
Number assigned in orders includes whom 76, 1891
Pay and allowances of, on retirement ..... Cir. 22, 1893
Retention of pay 85, 1890
Soldiers' Home tax ..... Cir. 8, 1886; 38, 1890
Subsistence of, in post hospitals ..... Cir. 2, 1887; Cir. 2, 1888
Transportation to and from places of business ..... Cir. 2, 1887
Traveling expenses 77, 1893

GENERAL SERVICE DETACHMENTS:
Disposition of, now at recruiting rendezvous lately known as general depots 33, 1894

GENERAL SHUNK POST, G. A. R.:
Donation of cannon and cannon balls to 59, 1882

GENEVA CONVENTION:
Brassard for persons neutralized by 38, 1890; 47, 1898; 80, 1899
Extract from treaty articles of 47, 1898
Published, etc 3, 1892
(*See* AMERICAN NATIONAL RED CROSS RELIEF COMMITTEE.)

GENEVA CROSS:
To be carried by hospital ship *Relief* 53, 1898

GEOGRAPHIC NAMES:
Board on, appointed 105, 1890
Decides that the name of West Indian island ceded by Spain to the United States is Puerto Rico and not Porto Rico, as published in General Order 158, Adjutant-General's Office, 1898 ..... 211, 1899
(*See* PORTO RICO.)

GEORGE H. THOMAS POST, G. A. R.:
Donation of cannon and cannon balls to 122, 1882

GEORGE STRONG POST, G. A. R.:
Donation of cannon and cannon balls to 122, 1882

GEORGIA:
Military geography—
Department of the Gulf discontinued; embraced in the Department of the East 174, 1899
Department of the South merged into Department of the East 71, 1883
Embraced in Department of the Gulf 7, 1898

GERRISH ISLAND, ME.:
Reservation on, named Fort Foster 43, 1900

GETTYSBURG BATTLEFIELD, PENNSYLVANIA:
Appropriations 22, 1887; 79, 1888; 32, 1889; 27, 1893; 43, 1894

GETTYSBURG NATIONAL PARK, PENNSYLVANIA:
Appropriations 30, 1896; 48, 1897; 104, 1898; 49, 1899; 84, 1900

GIRTHS:
For the cavalry service ..... Cir. 1, 1883

GLANDERS:
Letter of Maj. George M. Sternberg, surgeon, respecting origin, treatment, etc ..... Cir. L, Aug. 15, 1888

GLASSWARE. (*See* CHINA AND GLASSWARE.)

GLAZIERS:
Paid from what appropriation 9, 1882

GLOVES:
For general officers, officers of the general staff, and staff corps, prescribed 95, 1885
For mounted men, allowance of, reduced 29, 1884
Issue of leather, to enlisted men of coast artillery 52, 1900
(*See* UNIFORM.)

GOLD. (*See* MINING CLAIMS.)

GOLD LACE CHEVRONS. (*See* CHEVRONS.)

GOOSE ISLAND, WASHINGTON TERRITORY:
Proclaimed a military reservation 5, 1889

GOVERNMENT HOSPITAL FOR THE INSANE. (*See* APPROPRIATIONS; INSANE SOLDIERS, ETC.)

GOVERNMENT PRINTING OFFICE:
Appropriations 43, 1894; 13, 1895
Extra copies of documents printed at; how obtained ..... Cir. E, 1891
Repairs to War Department branch 30, 1896

GOVERNMENT TRANSPORTS. (*See* TRANSPORTS.)

GOVERNOR-GENERAL:
Salute 57, 1899
Status of 57, 1899
Visits of naval officers 57, 1899

GOVERNORS:
Appointment of officers of State militias enlisting in a body into the service of the United States, to be made by 98, 1898
Claims for expenses incurred in organizing and equipping volunteers .. 97, 1898
Examination of physicians appointed by, for service in the Volunteer Army ..... Cir. 21, 1898
Reimbursement for expenses incurred in organizing and equipping volunteer troops 49, 1899
Sale of subsistence stores to, of Territories ..... Cir. 2, 1883
Salute to, of States and Territories 110, 1890; 10, 1897

GOVERNORS ISLAND, NEW YORK:
Appropriations for sea wall 102, 1882; 17, 1883; 98, 1890

GRADUATES. (*See* HONOR GRADUATES.)

GRADUATES OF THE MILITARY ACADEMY:
Appointments and assignments in the Army—
Announced 58, 1881; 75, 1882; 44, 1883; 62, 1884; 74, 1885; 50, 1886; 45, 64, 1887; 56, 1888; 57, 1889; 104, 1890; 62, 1891; 51, 1892; 53, 1893; 24, 1894; 37, 1895; 29, 1896; 45, 1897; 43, 1898; 33, 1899; 87, 1900
How made ..... 22, 1881; Cir. 7, 1885; 33, 1886
Assignment or detail of, as professors, etc 74, 1882; 37, 1894
Diplomas 22, 1881
Leaves of absence 127, 1885; 5, 1887
Mileage to be paid in advance 75, 1882
Pay 127, 1885; 5, 1887
Physical disability 22, 1881
Transportation of baggage 26, 1886
Transportation of books 21, 1883; 52, 1887; 70, 78, 1891

GRAIN:
Full allowance to be issued where obtainable 54, 1898
Weight of, per bushel received under contract ..... Cir. 6, 1886

GRAND ARMY OF THE REPUBLIC:
Donation of condemned cannon, etc., to various posts 25, 1881; 51, 59, 82, 85, 103, 122, 1882; 42, 1889;
Wearing of button of ..... Cir. 8, 1890

GRAND TERRE ISLAND, LOUISIANA:
Military reservation turned over to Secretary of the Interior .. War Dept. Cir. 9, Sept. 28, 1886

GRATUITOUS ISSUE:
Subsistence stores to destitute persons in Alaska ..... Cir. 45, 1899
(*See* CONTAGIOUS DISEASES; DISINFECTING PROCESS.)

GRAVES OF DECEASED SOLDIERS:
To be properly marked and location definitely recorded 116, 1900

GREAT COATS:
Blanket or cloth lined, no longer supplied 52, 1881
To be designated as overcoats 62, 1883
(*See* UNIFORM.)

GREATER REPUBLIC OF CENTRAL AMERICA:
Detail of an officer to accept a position under the Government of 15, 1897

GREAT GULL ISLAND, CONNECTICUT:
Battery at, named Fort Michie 138, 1899

GREENLEAF'S EPITOME:
Record of physical examination to conform to ..... Cir. 2, 1893

GREEN RIVER EXPEDITION:
Names of members of, published to the Army in recognition of their courage, skill, and endurance 18, 1891

GREEN RIVER, KENTUCKY:
Appropriation for rebuilding lock on 26, 1893

GREENWOOD ISLAND, MISSISSIPPI:
Military reservation turned over to Secretary of the Interior 147, 1890

GROOMS:
Employment of enlisted men as ..... Cirs. 2, 11, 1886; Cir. 1, 1887

GROVERS CLIFF, MASSACHUSETTS:
Battery at, named Fort Banks 134, 1899
Designation of gun battery at 43, 73, 1900

GUAM. (*See* MAIL MATTER.)

GUARANTIES:
Advertisements or circulars giving instructions to bidders to state what, when, are required 60, 1883
Evidence of bidders' ability to carry proposals into effect to be furnished in lieu of 60, 1883
How executed 60, 1883
Proposals rejected unless accompanied by, if required 60, 1883; 179, 1898
When required 60, 1883
(*See* BONDS; BLANK FORMS.)

GUARANTORS:
Acceptance of, as sureties 60, 1883
Justification of, followed by what certificates 60, 1883; 80, 1892; 52, 1893

GUARD DUTY:
Details, how made 6, 1892
Roster ..... Cir. 8, 1889
(*See* MANUAL OF GUARD DUTY.)

GUARDHOUSES:
Inspection 40, 1890
Lamps 50, 1881; 80, 1882; 101, 1885
Toilet paper 113, 1899

GUARD MANUAL. (*See* MANUAL OF GUARD DUTY.)

GUARD MOUNTING:
Forms to be observed in ..... Cir. 3, 1886
Release of persons under guard without written charges 38, 1890
Stable guard of a light battery ..... Cir. 10, 1885

GUARD OF HONOR:
Names of officers composing the, to the remains of their late Commander in Chief, James A. Garfield, from the national Capitol to Cleveland, Ohio 71, 1881

GUARDS:
Approach to the guardhouse of new guard after guard mounting ..... Cir. 5, 1884
Duties of the sentinel at the post of the guard 38, 1890
Procedure when any person approaches a post of the guard at night. Cir. 4, 1884
Orders detailing, in charge of convicts sent to United States penitentiary ..... Cir. 8, 1895
Position on the march 38, 1890
Stable ..... Cir. 10, 1885; 23, 1886; 6, 1891
Supernumeraries of the guard detail ..... Cir. 2, 1890
Tours of duty 6, 1892
(*See* MANUAL OF GUARD DUTY.)

GUARDS AND SENTINELS:
Duties of ..... Cir. 4, 1884; Cir. 5, 1885

GUIDES. (*See* INDIANS.)

GUIDONS:
Cavalry, description of 10, 1885; 65, 1890
Indian scouts, description of ..... Cir. 10, 1890
Light artillery, description of 34, 1886, 65, 1890
Names of battles, when and how attached to 11, 65, 89, 113, 1890
Organizations to retain those carried in war with Spain 21, 1899

GUIDONS—Continued.
Prize, for batteries to which belong winning detachments at regimental and general artillery competitions 132, 1890
Silken, care of ..... Cir. 4, 1887
To mark the way to field hospitals 90, 1884; 83, 1889
Unserviceable, disposition of 11, 1890

GUILFORD BATTLE GROUNDS:
Appropriation for 30, 1896

GULF OF GEORGIA, WASHINGTON:
Certain lands in, proclaimed a military reservation 16, 1896
Part of military reservation on Sucia Islands transferred to Secretary of the Interior 52, 1896

GULF OF MEXICO:
Surveys for deep-water harbor 32, 1889

GUN FACTORIES:
Board to examine sites on Pacific coast for erection of a plant for finishing and assembling parts of heavy guns, etc 52, 1892
Board to inquire into advisability of erecting, at certain points 98, 1890
(*See* ARMY GUN FACTORY.)

GUNNERS:
Classification of, how determined 132, 1890; 14, 1895
Insignia ..... 14, 1895; 41, 1896; Cir. 15, 1897; 4, 1898; 80, 1899
Minimum qualifications 14, 1895
Retention of, by competitors 70, 1898
(*See* BADGES; BATTERY COMPETITIONS.)

GUNNERY SPECIALISTS:
Badges ..... 41, 1896; Cir. 15, 1897
Classifications ..... Cir. 15, 1897
Qualifications 41, 1896; 17, 1897

GUNS:
Board to consider changes in, for light batteries 39, 1881
Calibers, lengths of bore, etc., to be determined and made known to manufacturers and reported to Congress 73, 1884
Inspection ..... Cir. 19, 1898
(*See* ARTILLERY PRACTICE; FIELD GUNS; SIEGE GUNS.)

GUNSTOCKS:
Oiling ..... Cir. 26, 1897

GYMNASTIC AND ATHLETIC APPLIANCES:
Transportation for, how furnished ..... Cir. 2, 1896

HABEAS CORPUS:
Opinion of United States circuit court for eastern district of Michigan on petition for writ of, in case of Carl Cosenow, alias Fred Smith, a minor soldier in confinement under charge of desertion ..... Cir. B, March 20, 1889
Opinion of United States Supreme Court on petition for writ of, in case of John Grimley, imprisoned for desertion, having been over 35 years of age at time of enlistment 140, 1890
Frank Morrissey, in military custody for desertion, having enlisted while a minor 140, 1890
John A. Mason, in confinement in Albany Penitentiary under court-martial sentence for attempt to kill Charles J. Guiteau 61, 1882
Procedure in case of a writ of, issuing from a United States court or judge ..... 38, 1890; 127, 1900; Cir. 53, 1900

HAIRBRUSHES:
Sale of, to all soldiers 2, 1881
Sale of, to recruits 38, 1895

HAIR CINCHAS:
Lengths of ..... Cir. 2, 1892

HAMPTON NATIONAL CEMETERY, VIRGINIA:
Appropriation for additional land 109, 1890; 35, 1891
Appropriation for roadway 32, 1889; 109, 1890

HAMPTON ROADS:
Appropriation for gun and mortar batteries 37, 1891

HAND BASINS:
Sale of, to recruits 38, 1895

HANDKERCHIEFS:
Sale of, to recruits 34, 1882; 81, 98, 1883

HAND LITTERS:
Included in the equipage of a company ..... Cir. 10, 1887; 76, 1898; 119, 1900

HANDWRITING:
Certificate of disability to be in surgeon's own ..... Cir. 1, 1896
Payment of an expert in, as witness ..... Cir. 13, 1891

HANNIBAL AND SOUTHWESTERN RAILWAY COMPANY:
Authorized to construct bridge over Missouri River 46, 1882

HANNIBAL AND ST. JOSEPH RAILROAD COMPANY:
Appropriation to reimburse and pay the sum of $12,412 to 24, 1889

HARBOR DEFENSES:
Punishment of persons injuring 96, 1898
(*See* APPROPRIATIONS.)

HARBOR OF REFUGE:
Secretary of War to assume full control over the, on Lake Huron at Sand Beach, Michigan 79, 1882

HARBORS. (*See* RIVERS AND HARBORS.)

HARD BREAD:
Purchase of savings on, authorized ..... Cir. 8, 1899; Cir. 13, 1900
When issued ..... Cir. 13, 1900

HARNESS:
Board to consider changes in, for light batteries 39, 1881
Dressing or polishing material 29, 1894

HAT CORDS. (*See* UNIFORM.)

HATFIELD, MASS.:
Donation of condemned cannon to town of 122, 1882

HATS:
Campaign—
Gratuitous issue of cords and tassels for ..... Cir. 2, 1887
Sale of, not authorized ..... Cir. 11, 1883
Fatigue, may be worn on stable duty ..... Cir. 5, 1889; 87, 128, 1899
(*See* UNIFORM.)

HAVANA, CUBA:
Captain of the port of, how appointed 130, 1899
Ceremonies for evacuation of 188, 1898
Designated as the chief port of entry of the island of Cuba 186, 1898
Military governor—
Duties 184, 1898
Major-General Ludlow assigned to duty as 184, 1898
North American Trust Company designated as fiscal agents for ..... Cir. 5, 1899
(*See* DEPARTMENT OF HAVANA; DEPARTMENT OF THE PROVINCE OF HAVANA.)

HAVERSACKS:
Disposition of, on arrival of recruits at their destination 47, 1890; 5, 1894; 183, 1899
How marked 20, 1882
Soiled or greasy, not to be condemned but washed ..... Cir. 5, 1892

HAWAIIAN ISLANDS:
Added to the Department of California 95, 1898
Application for discharge of enlisted men serving in, not entertained at the present time ..... Cir. 38, 1898
Battalion of artillery organized for duty in 50, 1899
Census 50, 1900

HAWAIIAN ISLANDS—Continued.
Certain lands set apart for military purposes 147, 213, 1898
Discharge, travel pay, etc., of officers and enlisted men serving in, ordered mustered out 54, 1899
Increased pay to officers and enlisted men serving in 76, 1900
Leaves of absence to officers in 85, 1900
Notation on discharge certificate of men serving in ..... Cir. 51, 1898
Officers commanding troops in, to have full control of the hospital corps in their commands 86, 1899
Rendition of accounts of subsistence funds 42, 1900
Subsistence and transportation to the United States, of enlisted men discharged in 180, 1898; 5, 96, 1899
Transportation of soldiers dishonorably discharged in 96, 1899
Travel allowances of discharged soldiers reenlisting in 67, 1899
Travel expenses of officers en route to and from 42, 68, 112, 1899
(*See* MAIL MATTER.)

HAWKINS POINT, MARYLAND:
Battery at, named Fort Armistead 134, 1899

HAY:
Use of, for bedding 9, 1882
Use of, on Indian reservations by post traders ..... Cir. 6, 1886

HAY LAKE CHANNEL:
Certain lands in Michigan proclaimed reservations for public purposes in connection with improvement of 12, 110, 1885

HAY RESERVATION. (*See* FORT ASSINIBOINE, MONT.)

HEADQUARTERS. (*See* DEPARTMENT HEADQUARTERS; DIVISION HEADQUARTERS; HEADQUARTERS OF THE ARMY; REGIMENTAL HEADQUARTERS.)

HEADQUARTERS OF THE ARMY:
Allotment of general-service clerks and messengers 65, 1891
Captain Blunt relieved from duty at 62, 1889
Commanding generals of the Departments of Arizona, Missouri, and Texas to report directly to 84, 1890
Officers assigned to duty at—
Captain Blunt as inspector of rifle practice 122, 1884
Lieutenant-Colonel Vincent as assistant adjutant-general 72, 1888
Lieutenant Bliss as inspector of small arms and artillery practice ... 62, 1889
Brigadier-General Ludlow 50, 1898
Orders relating to small-arms practice 42, 1885; 2, 1889

HEADSTONES FOR GRAVES OF SOLDIERS. (*See* APPROPRIATIONS.)

HEARSES:
What may be used as, for military funerals ..... Cir. 13, 1891

HEATING PLANTS:
Detail of enlisted men on special duty to care for ..... Cir. 14, 1894; Cir. 2, 1895

HEAVY ARTILLERY MANUAL. (*See* MANUAL OF HEAVY ARTILLERY SERVICE.)

HEAVY BATTERIES:
Composition 16, 1900

HEAVY ORDNANCE:
Examination of inventions and improvements of 34, 48, 1881; 79, 1882
(*See* BOARD.)

HELENA, MONT.:
Military post at or near—
Appropriation for establishment of, how used 58, 1892; 27, 1893
Establishment of, authorized 84, 1892
To be known as Fort Harrison 84, 1892

HELIOGRAPH:
Instructions for use of 99, 1888
Tariff of messages ..... Cir. 27, 1899

HELL GATE, NEW YORK:
Appropriation for removal of obstructions at 58, 1882

HELMETS:
Metallic trimmings for, how issued and accounted for ..... Cir. 12, 1885
Wearing of cord and tassels attached to, by regimental adjutants.... Cir. 2, 1883

HENRY BARRACKS:
Military post at Cayey, P. R., designated 34, 1900

HERNIA:
Treatment of enlisted men who have been ruptured in the line of duty. Cir. 9, 1895

HIGHWOOD, ILL.:
Acceptance of land at, donated for military purposes authorized 26, 1887
Appropriation for buildings and wharf for post at..... 75, 1888
Military post at, to be designated Fort Sheridan..... 11, 1888

HIPPOLOGY:
Examination in, of certain lieutenants 80, 1891

HISTORIC GROUNDS, LOCATIONS, AND MILITARY WORKS:
Act to provide for survey of certain..... 40, 1888

HOLIDAYS:
Declared—
Centennial anniversary of inauguration of first President of the United States 32, 1889
Four-hundredth anniversary of the discovery of America..... 69, 1892
Payment in advance for ..... Cir. 2, 1886
Payment of per diem laborers on Decoration Day and the Fourth of July 25, 1887

HOME FOR DISABLED VOLUNTEER SOLDIERS:
Establishment of Branch 76, 1884
Issue of condemned ordnance to..... 76, 1900

HOMICIDE:
Decision of United States circuit court for district of Nebraska in case of Corporal Fair and Private Jockens who, while members of the guard, killed a prisoner who was attempting to escape..... Cir. 53, 1900
Decision of United States circuit court for eastern district of Michigan in case of a sergeant of the guard who killed a prisoner who was attempting to escape..... Cir. AD, Nov. 1, 1887

HONGKONG AND SHANGHAI BANKING CORPORATION:
Authorized to act as a depository for the War Department for the Philippine Islands..... 160, 1899

HONOLULU:
Certain lands in, set aside for military purposes..... 213, 1899
Designated a saluting station 180, 1899

HONORABLE MENTION:
An order to be published annually making mention of gallant or specially meritorious acts or conduct in service, etc 109, 1888
Names of officers and enlisted men who distinguished themselves by specially meritorious acts or conduct in service... 17, 18, 34, 39, 41, 44, 100, 1891; 33, 1892; 70, 1893; 59, 1894; 34, 1895; 21, 1896; 67, 1897; 15, 1900
Recommendations for, how made..... 135, 1898

HONOR GRADUATES:
Artillery school 18, 1890
Infantry and cavalry school..... 57, 1893

HONORS. (*See* FUNERAL HONORS.)

HORN ISLAND, MISSISSIPPI:
Part of military reservation on, turned over to Secretary of the Interior.. 58, 1895

HORSE EQUIPMENTS:
Cavalry..... 73, 1885; 41, 67, 1898
Housing for general officers'..... 9, 1893
Officers' ..... Cir. 6, 1886
Saddle cloths—
Line officers'..... 95, 1884; 8, 1885; 6, 1886, 9, 1893
Staff officers'..... 8, 1885; 44, 1886; 9, 1893; Cir. 1, 1897
Sale of, to volunteers 142, 1898
(*See* HARNESS; SADDLES.)

HORSES:
Allowance to medical department in the field 76, 178, 1898
Appropriation for purchase of a draft team for Willetts Point, N. Y.....12, 1896
Branding cavalry horses ..... Cir. 11, 1888
Classification of, by inspectors 81, 1898
Condemnation of serviceable probibited ..... Cir. 3, 1899
Description to which cavalry and artillery must conform 38, 1890
Destruction of, by veterinary surgeons and others when necessary 87, 1898
Exchange of, in cavalry regiments 153, 1898
Members of hospital corps in the field, how furnished with ..... Cir. 1, 1893
Number allowed batteries of light artillery 21, 1898; 16, 1900
Number of, to be owned by mounted officers ..... Cir. 9, 1884
Officers of light batteries may use battery horses 86, 1884
Sale of, to mounted officers 103, 1883; 92, 1885
Suspends restrictions placed upon purchase and number of 66, 1898; 49, 1899; 27, 1900
Transportation of attendants in charge of ..... Cir. 1, 1884; Cirs. 4, 10, 1887; Cir. 3, 1888; 38, 1890
Transportation of, for officers ..... Cir. 6, 1885; Cir. 9, 1886; 38, 1890; Cir. 8, 1894; 38, 1897; 26, 157, 1899
Use of condemned cavalry, for transportation purposes not approved. Cir. 3, 1883
Use of, for draft purposes west of Mississippi River forbidden 59, 1883
Veterinary surgeons to be provided with a public animal when required to be mounted ..... Cir. 11, 1885
(*See* APPROPRIATIONS; CAVALRY HORSES; PUBLIC ANIMALS.)

HORSESHOEING:
Expense of shoeing officers' private horses ..... Cir. 9, 1885
General directions for shoeing cavalry horses 16, 1888

HORSESHOES AND NAILS:
Sale of, required to shoe officers' private horses ..... Cir. 11, 1885
Supply and issue of 19, 1885; 23, 1896

HOUSING:
For general officers 9, 1893

HOUSTON, TEX.:
Military reservation in, turned over to Secretary of the Interior 10, 1891
Order turning over military reservation to the Secretary of the Interior revoked 33, 1891

HOSPITAL ATTENDANTS:
How considered in computation of figure of merit ..... Cirs. 2, 6, 1887
(*See* NURSES.)

HOSPITAL BEDDING:
Use of, for other than hospital purposes prohibited 88, 1886

HOSPITAL CORPS:
Act to organize the, and define its duty and fix its pay 29, 1887; 50, 1892
Clothing for war duty ..... Cir. 20, 1897
Company of instruction at Washington Barracks, D. C., attached to the United States General Hospital 3, 1900
Condemned horses not to be used as mounts for ..... Cir. 3, 1898
Control of, outside the limits of the United States 178, 1898; 86, 1899
Detail of a private as nurse for a sick officer ..... Cir. 4, 1892
Detail of enlisted men for duty in 126, 1898
Discharge of volunteers previously transferred to. Cirs. 45, 50, 1898; Cir. 12, 1899
Each garrison to supply material for its quota of ..... Cir. 9, 1889
Enlistment papers 38, 1890; 25, 1892; 58, 1898
Enlistments and reenlistments ..... Cir. 10, 1887; Cir. 3, 1888; 91, 1889; Cir. 3, 1890; 97, 1891; 25, 1892; Cir. 2, 1892
Field service 82, 1890; 97, 1891
Firearms issued to members of, when ..... Cir. 2, 1896
Form for return of 76, 1887
Horses for members of, in the field ..... Cir. 1, 1893; 76, 1898
Insignia of rank of privates 38, 1890
Inspection 38, 1890
Instruction in drills ..... Cir. 19, 1893; 60, 1897
Issue of full-dress uniform discontinued 37, 1896; 62, 1898
Members of casually at post; preparation of final statements, etc 119, 1900

HOSPITAL CORPS—Continued.
Members of, entitled to participate in distribution of canteen profits. Cir. 11, 1889; Cir. 4, 1892
Number of men allowed a regiment 86, 1899
One-fourth of money received for treatment of other than soldiers in post hospitals to be divided among members of the 31, 1891
Post traders' tax ..... Cir. 3, 1889
Rations ..... Cir. 2, 1889
Reorganization of the 37, 1899
Retransfer to the line ..... Cir. 3, 1888
Rules and regulations for government of 56, 1887; 47, 1888
Temporary increase of allotment of privates at posts where no detail of acting hospital stewards has been made ..... Cir. 3, 1888
Transfers of volunteers 58, 1898
Transfers to ..... Cir. 10, 1887; Cir. 9, 1888; Cir. 7, 1889; 38, 1890; 3, 19, 1893
White duck clothing 2, 1900
(*See* ACTING HOSPITAL STEWARDS; HOSPITAL STEWARDS; UNIFORM.)

HOSPITAL COWS. (*See* FORAGE.)

HOSPITAL FUNDS:
Assessment of, for partial payment for seeds for post gardens 38, 1890
Contributions to, of articles purchased for special diet prohibited 125, 137, 182, 1899
From what sources obtained 38, 1890; 31, 1891; 55, 1894
Purchases of subsistence for civilians admitted to hospitals to be made from 38, 1890
Regarded as company funds 55, 1894
Transportation of articles purchased with ..... 3, 53, 1885; Cir. 12, 1887; 38, 1890
(*See* BLANK FORMS.)

HOSPITAL MATRONS:
Allotment of, to certain posts and stations; all in excess of this allotment to be discharged ..... Cir. 9, 1892
Selection and appointment of; number allowed; muster and pay rolls .. 76, 1887
(*See* APPROPRIATIONS; BLANK FORMS.)

HOSPITAL ROLLS:
Contents 38, 1890; 67, 1891

HOSPITALS:
Admission of civilian employees ..... Cirs. 7, 10, 1888; 38, 1890
Admission of civilians ..... 102, 1888; Cir. 5, 1888; Cir. 8, 1889; 90
Admission of officers' servants ..... Cir. 1, 1890
Assignment of patients to wards 146, 1890
Charges for admission to 102, 1888; 38, 1890; 31, 1891; 119, 1900
Construction and repairs 51, 66, 1887; 101, 1888
Descriptive lists of sick and wounded soldiers 31, 1899
Diet table 9, 1884
Disposition of certain patients 114, 1898
Disposition of moneys received for board of officers in ..... Cir. 8, 1889
Disposition of surplus bread ..... Cir. 3, 1890
Estimates for repairs to ..... Cir. 6, 1892
Extra-duty pay of cooks and nurses ..... 47, 1882; 30, 1883; 58, 1884; 70, 1886; Cir. 10, 1886; 102, 1888
Flags 90, 1884; 83, 1889
Inspection 38, 40, 1890; 194, 1898, 194, 1899
Issue of meat rations to ..... Cir. 7, 1888
Lamps for troops in 50, 1881
Muster rolls ..... 26, 29, 1882; Cir. 9, 1883
Provision for, in Cuba prior to arrival of troops therein 176, 1898
Reports 114, 126, 1898
Sale of subsistence supplies ..... 27, 1881; 72, 1882; 82, 1884.
Savings of rations ..... 25, 1882; Cir. 1, 1883; 140, 1884
Subsistence of general service clerks and messengers in post ..... Cir. 2, 1887; Cir. 2, 1888
Subsistence of retired enlisted men ..... Cir. 3, 1887
Subsistence of veterinary surgeons ..... Cir. 10, 1888
Terms of purchase of subsistence stores by 73, 1890; 53, 1892
Transfer of soldiers to 31, 38, 1890

HOSPITAL CORPS—Continued.
Transportation and commutation of rations to enlisted men traveling to and from hospitals to their homes on furlough under G. O. No. 114, 1898 ..... Cir. 57, 1899
(*See* ARMY AND NAVY GENERAL HOSPITAL; BRIGADE HOSPITALS; CIVIL HOSPITALS; COLUMBUS BARRACKS; DISCHARGED SOLDIERS; DIVISION HOSPITALS; FIELD HOSPITALS; FINAL STATEMENTS; FORT LEAVENWORTH, KANS.; FORT MEADE; FURLOUGH; GARFIELD MEMORIAL HOSPITAL; GENERAL HOSPITALS; GOVERNMENT HOSPITAL FOR THE INSANE; HOSPITAL TRAINS; HOSPITAL TRANSPORTS; INVENTORY OF EFFECTS OF DECEASED SOLDIERS; MEDICAL OFFICERS; POST HOSPITALS; PROVIDENCE HOSPITAL; REGIMENTAL HOSPITALS; SPECIAL DIET; SUBSISTENCE FUNDS; UNITED STATES MILITARY ACADEMY.)

HOSPITAL STEWARDS:
Accounts of pay and clothing 76, 1887
Allowance of quarters, fuel, etc 118, 1900
Appointment and number of 30, 54, 1881; 98, 104, 1884; 62, 70, 1885; 12, 1896; 58, 1898; 76, 1900
Authorized number 37, 1899; 76, 1900
Baggage allowance 2, 1890; 119, 1900
Clerical work 54, 1881; 104, 1884; 43, 1886
Commutation 54, 1881; 104, 1884
Discharge certificates ..... Cir. 11, 1887
Discharge of the second class ..... Cir. 10, 1886
Division and department headquarters ..... 54, 1881; 104, 1884; 43, 1886; Cir. 9, 1886
Examination and appointment 20, 1899
Extra-duty pay 30, 1883; 58, 104, 1884
Full-dress uniform discontinued 37, 1896; 62, 1898
Insignia of rank 38, 1890
Lamps for, how provided ..... Cir. 6, 1896
Mounts for, in the field 76, 1898
Muster of ..... Cir. 2, 1885
Number allowed a regiment 36, 86, 122, 1899
Number allowed an army corps 82, 1898
Number increased by 100 ..... 76, 1900
Number limited to 100 ..... 12, 1896
Personal reports 76, 1887
Rank and precedence ..... 80, 1885; 4, 1886; Cir. 12, 1886; 76, 1887; 38, 1890; 82, 1891; 106, 111, 1899
No more than one to be stationed at one post or station 76, 1900
Reduction and trial 2, 1885; 38, 1890; 16, 1895; 16, 1898
Reenlistment 76, 1887; 38, 1890
Reenlistment papers 2, 69, 1885; 76, 1887
Requirements of candidates for appointment as, in the volunteer infantry . 122, 1899
Reviews and inspections ..... Cir. 7, 1886
Side arms ..... Cir. 16, 1893
Special reports of discharge 76, 1887
Temporary increase in number during existing war 62, 1898
Those mustered in with volunteer regiments to be assigned to duty by commanding generals 82, 1898
Transportation of professional books in changing station 70, 78, 1891
(*See* ACTING HOSPITAL STEWARDS; BLANK FORMS; NONCOMMISSIONED STAFF OFFICERS; QUARTERS; UNIFORM.)

HOSPITAL STORES:
Dispensed to whom 38, 1890
Issue to citizens ..... Cir. 10, 1890
Use of, for any purpose not provided for by law or regulations, prohibited . 88, 1886

HOSPITAL SUPPLIES:
Purchase of 64, 1894
Sale authorized 32, 1892
(*See* MEDICAL AND HOSPITAL SUPPLIES.)

HOSPITAL TENTS:
Commanding generals of camps to erect barracks when short of 117, 1898
For regimental hospitals 151, 178, 1898

HOSPITAL TRANSPORTS. (*See* SPECIAL DIET.)

HOTCHKISS B. L. MOUNTED GUN:
Expenditure of ammunition for, in target practice ..... Cir. 1, 1891

HOT SPRINGS, ARK.:
Military reservation turned over to Secretary of the Interior..... 96, 1890
(*See* ARMY AND NAVY GENERAL HOSPITAL.)

HOURS OF LABOR:
Clerks and other employees of Executive Departments..... 16, 1883
Extra-duty men..... 19, 1889; Cir. 10, 1889; Cir. 2, 1890
Laborers and mechanics..... 56, 31, 1892; 74, 1893

HOWARD UNIVERSITY:
Appropriation..... 84, 1900

HUNTING:
Ammunition 44, 1881; 53, 1882; 23, 1883; 42, 1885
Permission to hunt..... 130, 1884; Cir. 11, 1895

HYGIENE:
Duties of medical officers at posts..... 38, 1890
Sanitary reports..... 5, 1893

ICE:
Purchase of sawdust and lumber for use in packing ..... Cir. 3, 1888

ICE HARBOR:
Examination and survey for, near Cincinnati, Ohio 27, 1893

ICE MACHINE:
Purchase of, for use at posts..... Cir. 5, 1883

ILLINOIS:
Military geography—
Embraced in the Department of the Lakes 7, 1898
Embraced in the Department of the Missouri..... 57, 1891
Transferred from Department of the Missouri to Division of the Missouri 84, 1890

ILLINOIS RIVER. (*See* BRIDGES.)

ILLUMINATING SUPPLIES:
Additional burners for companies, troops, etc..... 5, 1898
Issue of, to a troop, company, or detachment ..... Cir. 2, 1883; 5, 1898
Quartermaster's Department 50, 1881
Regimental-post or company funds 7, 1882
Requisitions 84, 1884
Requisitions and issues..... 14, 1883
Sales to officers ..... 50, 1881; 14, 1883; Cir. 1, 1883; 34, 1885; Cir. 5, 1898
Subsistence Department..... 50, 1881; 37, 1882
Volatile oils..... Cir. 8, 1896
(*See* LAMPS; MINERAL OIL.)

IMMUNES:
Organization of ten regiments of 55, 1898

IMPORTATION:
Of articles for the use of the United States 126, 1890; 42, 1898; 49, 1899
Of books by army officers..... Cir. 8, 1884

INAUGURATION OF FIRST PRESIDENT OF THE UNITED STATES:
Centennial anniversary of, declared a national holiday..... 32, 1889

INCREASED PAY:
For exercise of higher command ..... Cir. 21, 1900
For foreign service—
Acting assistant surgeons not allowed..... Cir. 43, 1900
Date of beginning and ending..... Cirs. 21, 43, 1900
Officers and enlisted men 76, 1900
Veterinarians ..... Cir. 47, 1900
Plan to facilitate payment of—
For continuous service..... 134, 1900
For service abroad..... 95, 102, 1900

INCREASED RANK:
Appropriation for pay of, when in command by proper authority..... 76, 1900

tion in reply to question 25, as follows: "I looked after the injured persons until I had all the injured ones taken from the train." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 26 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 26, as follows: "On the west end of the trestle over B. & M. railroad and U. P. railroad." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 27 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 27, as follows: "I went up on the trestle and examined it." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 28 as incompetent, irrelevant, and immaterial. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition as follows: "About ten minutes." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 29 as incompetent, immaterial, and irrelevant and no foundation laid. Objection is sustained.
89 Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 29, as follows: "No, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 30 as incompetent, immaterial, and irrelevant and no foundation laid and not a matter in issue in this case. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 30, as follows: "I found a claw-bar, sometimes called a clinch-bar, a pair of pinchers, an angle bar, bolts and two nuts. The pinchers, angle bar, bolts, and nuts were found under the first joint of west end of the bridge, and the claw-bar was found on the fill or bank south of the track, about twenty feet. The first and second rails on the south side of the bridge and immediately east from the west end of the bridge were turned over to the south or southeast, and from six to twelve inches south of the line of the rail west thereof. The second rail on the south was bent out of shape and turned farther around than the one west of it. I also examined spike-holes on the south side of the bridge which had held the south rail at the west end of the bridge in position. The condition of the holes were that the spikes must have been drawn with a claw-bar. The impression of a claw-bar or some hard instrument was on the ties at each of the spike-holes, and the holes appeared new, as if the spikes had been out of them only a few minutes. The nuts that I
90 found were under the first joint east of the west end of the trestle and on the south side and within a few inches of the bolts. The threads on the bolts were in good condition, as though the nuts had been removed a few minutes before. I also observed imme-

diately east of the first joint of the west end of the bridge and on the south side marks or indentations made by the flange of the wheels of the engine and cars. These marks on the ties were on the south side and a few inches north of the south rail at the west end of the bridge or trestle." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff moves to strike out the answer to question 30 as incompetent, immaterial, and irrelevant and not pertinent to the issues of this case.

Plaintiff objects to question 31 as incompetent, immaterial, and irrelevant and not within the issues of the case. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 31, as follows: "In good condition, the cars and engine being in first-class order." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 32 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 32, as follows: "About a year and a half." The offer is denied and refused by the court; to which defendant excepts.

91 Plaintiff objects to question 33 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 33, as follows: "Nothing while running." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 34 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 34, as follows: "I saw a couple of farmers and a colored man, George Washington Davis, coming down off the fill of the west end of bridge between five and ten minutes after the wreck occurred." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 35 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 35, as follows: A. "The same as it had been ever since I had been on the run with great care and caution." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 36 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 36, as follows: "By engineer and fireman, baggageman and brakeman and conductor.

Plaintiff objects to question 37 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to ques-

92 tion 37 in the deposition, as follows: "About nine months." The offer is denied and refused by the court; to which de-

fendant excepts. The first 17 questions of said deposition and the answers thereto were read in evidence; the rest *was* excluded.

Defendant offers in evidence the deposition of LEWIS RYAN (which is hereinafter set out, commencing at page 184).

The plaintiff objects to the deposition of Ryan as shown by *their* objections on file in this court, which are specifically stated as follows:

Plaintiff objects to question 6 as incompetent, irrelevant, and immaterial. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 6, as follows: "With my cousin Frank." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 7 as incompetent, immaterial, and irrelevant; which objection is sustained. Defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 7, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 8 as incompetent, immaterial, and irrelevant, and the objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 8, as follows: "A little south of the Penn.
93 road, what is known as the Penn. road." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 9 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 9, as follows: "On the Union Pacific track." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 10 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 10, as follows: "It is about two blocks, I should say." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 11 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 11, as follows: "Walking." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 12 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be — stated in the deposition in reply to question 12, "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 13 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in
94 reply to question 13, as follows: "*I* It is about between a mile and a half and two miles." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 14 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 14, as follows: "Three." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 15 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 15, as follows: "He was a colored man; looked something like an office official—tall, weight between 180 and 190, and heavy, square shoulders." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 16 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 16, as follows: "Walking very slow and had a shuffling gate." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 17 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in
95 reply to question 17, as follows: "When I was going by him, up to him, I supposed he had a gun and game sack in his hand and over his shoulder, and when I got up close I saw it was a crowbar." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 18 as incompetent, immaterial, and irrelevant. Objection is overruled. Defendants excepts and offers to prove that the answer would be as stated in the deposition in reply to question 18, as follows: "And a sack of some coarse material." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 19 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 19, as follows: "It was what appeared to be a gunny sack rolled up at the mouth; about a foot rolled down at the mouth, and it had an ang-ler object in it." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 20 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 20, as follows: "Over his left shoulder; had hold of it with his left hand." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 21 as incompetent, immaterial, and irrelevant. Objection is sustained. To which the defendant excepts, and the defendant offers to prove that the answer would be as
96 stated in the deposition in reply to question 21, as follows: "We passed him twice within about three feet." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 22 as incompetent, immaterial, and irrelevant. Objection is sustained; to which the defendant excepts and offers to prove that the witness Ryan would answer in response to question 22 as stated in the deposition, "I know it was either a crowbar or clawbar, because I was looking at him closely when we passed." The offer is refused and denied by the court; to which defendant excepts.

The plaintiff objects to question 23 as incompetent, immaterial, and irrelevant; which objection is sustained, and the defendant excepts, and defendant offers to prove that the witness Ryan, in response to question 23, would answer as stated in his deposition, "Two or three days after this." The offer is refused and denied by the court; to which defendant excepts.

Question 24 is objected to as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the witness Ryan would testify in response to question 24 as stated in his deposition, as follows: "At the city jail." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 25 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that Ryan would answer in response to question 25 as stated in his deposition, as follows: "Not the first time; no." The offer is refused and denied by the court; to which defendant excepts.

97 Plaintiff objects to question 26 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the witness would answer to question 26 as stated in his deposition, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Question 27 is objected to by plaintiff as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts, and defendant offers to prove that the witness would answer in response to question 27 as stated in his deposition, as follows: "It was the same gait, slow; it was a lazy, shambling gait." The offer is denied and refused by the court; to which defendant excepts.

The plaintiff objects to question 28 as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts, and defendant offers to prove that the witness would answer in response to question 28 as stated in his deposition, as follows: "About half past eight." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 29 as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts and offers to prove that the witness Ryan would answer in response to question 29 as stated in his deposition, "A very dark-colored suit." The offer is denied and refused by the court; to which defendant excepts.

98 Plaintiff objects to question 30 as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant offers to prove that the witness would answer as stated in his depo-

sition in response to question 30, as follows: "Yes, sir; I saw the coat." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 31 as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant offers to prove that the witness would answer as stated in his deposition in response to question 31, as follows: "As near as I can remember, it was the same cut and same shape of coat." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 32 as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts, and defendant offers to prove that the witness would answer in response to question 32 as stated in his deposition, as follows: "I do." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 33 as incompetent, immaterial, and irrelevant; which objection is sustained; to which defendant excepts, and defendant offers to prove that the witness would answer as stated in his deposition, in response to question 33, "About three or four hundred feet south of the Pen. road and about a hundred feet to the right of the U. P. track." The offer is denied and refused by the court; to which defendant excepts.

99 Plaintiff objects to question 52 as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts, and defendant offers to prove that the witness would answer as stated in his deposition in response to question 52, as follows: "I made a statement to my father the next morning about eight o'clock, and that morning he made a statement to the anthorities." The offer is refused and denied by the court; to which defendant excepts.

The above objections of plaintiff being on file with the clerk of the district court of Thayer county, said first six questions & answer-thereto were admitted in evidence; the rest were excluded.

The defendant now offers to read in evidence the deposition of ERNEST SHELLENBERGER (which is hereinafter set out, commencing on page 189); to which the plaintiff offers objection as on file in the files of this court to questions and answers thereof, as follows: To question 54 the plaintiff objects as incompetent, immaterial, and irrelevant; which objection is sustained, and the defendant excepts and defendant offers to prove by the witness that he would answer as stated in his deposition in response to question 54, as follows: "I am." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 55 as incompetent, immaterial, and irrelevant, and the objection is sustained; to which the defendant excepts, and defendant offers to prove that the witness would state in response to question 55, as stated in his deposition, as follows: "Known him about three years." The offer is denied and refused by the court; to which defendant excepts.

100 To question 56 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the witness would answer

as stated in his deposition in response to question 56, as follows: A. "I was." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 57 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offeres to prove that the witness would answer in response to question 57, as stated in his deposition, as follows: "I saw him on the night of the wreck." The offer is denied and refused by the court; to which defendant excepts.

To question 58 the plaintiff objects as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts, and the defendant offers to prove by the witness that he would answer as stated in his deposition in response to question 58, as follows: "Well, south of the wreck; probably about a half a mile." The offer is denied and refused by the court; to which defendant excepts.

To question 59 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and the defendant excepts, and defendant offers to prove that the witness would answer as stated in his deposition in response to question 59, as follows: "The Rock Island railway." The offer is denied and refused by the court; to which defendant excepts.

The plaintiff objects to question 60 as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts, and defendant offers to prove that the witness would
101 answer as stated in his deposition in response to question 60, as follows: "I met him south." The offer is refused and denied by the court; to which defendant excepts.

The plaintiff objects to question 61 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the witness would answer as stated in his deposition in response to question 61, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

The plaintiff objects to question 62 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the witness would answer as stated in his deposition in response to question 62, as follows: "Marvin Crawford." The offer is refused by the court; to which defendant excepts.

Plaintiff objects to question 63 as incompetent, immaterial, and irrelevant, and the objection is sustained; to which defendant excepts, and defendant offers to prove that the witness would testify as stated in his deposition in response to question 63, as follows: "I did." The offer is denied and refused by the court; to which defendant excepts.

To question 64 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the witness would answer as stated in his deposition in response to question 64, as follows: "Why, he had on a dark pair

of pants, I think, with a vest, and no coat on." The offer is refused and denied by the court; to which defendant excepts.

102 To question 65 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the witness would answer as stated in his deposition in response to question 65, as follows: "Had no coat on at all." The offer is denied and refused by the court; to which defendant excepts.

To question 66 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the witness would answer as stated in his deposition in response to question 66, as follow-: "He was carrying a lantern." The offer is denied and refused by the court; to which defendant excepts.

To question 67 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the witness would answer as stated in his deposition in response to question 67, as follows: "I should judge it was about a half an hour." The offer is denied and refused by the court; to which defendant excepts. All of said deposition was excluded.

The defendant now offers in evidence the deposition of FRED FOSTER (which is hereinafter set out, commencing on page 191) and offers to read each question in evidence and the answers thereto; to which the plaintiff objects, as shown by their recorded objections on file as follows to questions 87, 88, 89, 90, 91, 92, 93, 94, 95. The objection is made as incompetent, immaterial, and irrelevant; which objection is overruled, and plaintiff excepts.

To question 96 the plaintiff objects as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant

103 excepts, and defendant offers to prove that the witness would answer in response to question 96 as stated in his deposition, as follows: "They were all right." The offer is refused and denied by the court; to which defendant excepts.

To question 97 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the witness would answer as stated in his deposition in response to question 97, as follows: "I was there that night." The offer is denied and refused by the court; to which defendant excepts.

To question 98 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the witness would answer as stated in his deposition in response to question 98, as follows: "Yes, sir." The offer is refused and denied by the court; to which defendant excepts.

To question 99 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the witness would answer as stated in his deposition in response to question 99, as follows: "We crossed that particular place that very night going out over the Union Pacific track." The offer is refused and denied by the court; to which defendant excepts.

To question 100 the plaintiff objects as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts and offers to prove that the witness would answer as stated in his deposition in response to question 100, as follows: "Yes, sir." The offer is refused and denied by the court; to which defendant excepts.

104 To question 101 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the witness would state in response to question 101 as stated in his deposition, as follows: "It was all right." The offer is denied and refused by the court; to which defendant excepts.

To question 102 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the witness would answer as stated in his deposition in response to question 102, as follows: "Not now." The offer is denied and refused by the court; to which defendant excepts.

To question 103 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the witness would answer, as stated in his deposition in response to question 103, as follows: "Since the 15th of last September." The offer is refused and denied by the court; to which defendant excepts.

The defendant offers in evidence the deposition of BERT FOSTER (which is hereinafter set out, commencing on page 194) and offers to read each question and there answers thereto in evidence; to which the plaintiff makes the objections as on file, which are set forth as follows: To question 105 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the witness would answer in response to

105 question 105 as stated in his deposition, "Twenty-one years old; Roca, Neb." The offer is refused and denied by the court; to which defendant excepts.

To question 106 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 106, as follows: "Working on the Rock Island." The offer is denied and refused by the court; to which defendant excepts.

To question 107 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 107, which is as follows: "Now." The offer is refused and denied by the court; to which defendant excepts.

To question 108 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 108, as follows: "My business ain't much of anything; working for the stoveware now." The offer is denied and refused by the court; to which defendant excepts.

To question 109 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 109, as follows: "About four months." The offer is denied and refused by the court; to which defendant excepts.

106 To question 110 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in response to question 110, as follows: "Yes, sir." The offer is refused and denied by the court; to which defendant excepts.

To question 112 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in response to question 112, as follows: "To the Rock Island wreck."

To question 112 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 112, as follows: "Oh, about eleven or half past, as he said." The offer is denied and refused by the court; to which defendant excepts.

To question 113 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in response to question 113, as follows: "I don't know just exactly when we was there before." The offer is refused and denied by the court; to which defendant excepts.

To question 114 the plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in response to question 114, as follows: "The same day." The offer is refused and denied by the court; to which defendant excepts.

107 The plaintiff objects to question 115 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in response to question 115, as follows: "I don't know as—we was down there that night swimming." The offer is refused and denied by the court; to which defendant excepts.

To question 116 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in response to question 116, as follows: "We was at Rokeby." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 117 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 117, as follows: "No place. Oh, we was swimming between six and nine." The offer is denied and refused by the court; to which defendant excepts.

To question 118 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to

prove that the answer would be as stated in the deposition in response to question 118, as follows: "Yes, sir." The offer is refused and denied by the court; to which defendant excepts.

To question 119 plaintiff objects as incompetent, immate-
108 rial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 119, as follows: "Well, about half past six, I guess." The offer is denied and refused by the court; to which defendant excepts.

To question 120 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 120, as follows: "Down to Lincoln Park swimming hole." The offer is denied and refused by the court; to which defendant excepts.

To question 121 plaintiff objects as incompetent, immaterial, and irrelevant, and the same is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 121, as follows: "On the hand car." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 122 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 122, as follows: "I couldn't tell you that." The offer is refused and denied by the court; to which defendant excepts.

To question 123 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 123, as follows: "Well, it was about a mile and a half." The offer is refused and denied by the court; to which defendant excepts.

109 To question 124 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 124, as follows: "Yes, sir." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 125 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 125, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 126 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 126, as follows: "Good condition." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 127 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to

prove that the answer would be as stated in his deposition in response to question 127, as follows: "We didn't examine it, but seen everything was all right." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 128 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and
110 offers to prove that the answer would be as stated in his deposition in reply to question 128, as follows: "Yes, sir." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 129 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 129, as follows: "North." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 130 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 130, as follows: "Went over the U. P. track." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 131 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 131, as follows: "To see the U. P. train go under." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 132 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 132, as follows: "To Rokeby." The offer is refused and denied by the court; to which defendant excepts.

111 Plaintiff objects to question 133 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 133, as follows: "About eight o'clock." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 134 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 134: "Yes, sir." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 135 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 135, as follows: "Good condition." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 136 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in reply to question 136,

as follows: "All of us." The offer is denied and refused by the court; to which defendant excepts. All of said deposition is excluded.

The defendant now offers to read in evidence deposition of WILLIAM E. PAINTER (which is hereinafter set out, commencing on page 200), and each and every question and the answers thereto;
112 to which the plaintiff makes the objections as set forth in his objections on file in this court, which are as follows:

Plaintiff objects as incompetent, immaterial, and irrelevant to question 167; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 167, as follows: "I am chief clerk for the superintendent of the Burlington at Lincoln." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 168 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 168, as follows: "Since 1875." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 169 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in answer to question 169, as follows: "Why, in a general way, the supervision of the division under the instructions of the sup't." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 170 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 170, as follows: "In case a wreck happens it is my duty to see that proper means are taken to put it in shape, see if any people are injured, and see that the track is put in shape for
113 trains." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 171 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts; and defendant offers to prove that the answer would be as stated in the deposition in reply to question 171, as follows: "A few; couldn't say how many." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 172 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 172, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 173 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 173, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 174 as incompetent, immaterial, and

irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 174, as follows: "I was notified that the trestle was burning in such a manner that it was likely to fall on and endanger our track." The offer is denied and refused by the court; to which defendant excepts.

114 Plaintiff objects to question 175 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 175, as follows: "About one o'clock a. m." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 176 as incompetent, immaterial and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 176, as follows: "Yes, sir; a casual one." The offer is denied and refused by the court; to which defendant excepts.

To question 177 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 177, as follows: "Yes, sir." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 167 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be, as stated in his deposition in reply to question 167 A, as follows: "I found where some spikes had been pulled from some bridge ties near the west end of the bridge, and one pair of fish-plates removed from the south rail. There might have been more than that, but I didn't look beyond that." The offer is denied and refused by the court; to which defendant excepts.

115 Plaintiff objects to question 168 A as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 168 A, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 169 A as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in reply to question 169 A, as follows: "Yes; where the marks were; where the engine -truck the ties." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 170 A as incompetent, immaterial, and irrelevant; which is sustained; to which defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 170 A, as follows: "Excepting where the spikes were pulled they were all right." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 171 A as incompetent, immaterial, and

irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in reply to question 171 A, as follows: "There was a mark showing wheel marks, but the material was in good condition." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 172 A as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and
116 defendant offers to prove that the answer would be as stated in his deposition in reply to question 172 A, as follows: "All right—that is, there was nothing to indicate any imperfection in any way." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 173 A as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 173, as follows: "Not so far as I found." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 174 A as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 174 A, as follows: "They were clean, indicating that the spikes had been drawn with a bar." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 175 A as incompetent, immaterial, and irrelevant; which is sustained, and which defendant excepts to and offers to prove that the answer would be as stated in the deposition in reply to question 175 A, as follows: "Yes, sir; the tie will indicate that." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 176 A as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in
117 reply to question 176 A, as follows: (No reply to this question.)

Plaintiff objects to question 177 A as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 177 A, as follows: "It would be simply a clean hole showing the spike had been lifted out." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 178 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be in reply to question 178 as stated in the deposition, which is as follows: "Ragged; the hole would be ragged." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 179 as incompetent, immaterial, and irrelevant; which is sustained *which is sustained*, and defendant excepts and offers to prove that the answer would be as stated in his deposition in response to question 179, as follows: "In that case I couldn't, because I didn't observe the holes themselves close enough.

There was the mark of the claw-bar on the top." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 180 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 180, as follows: "Two or three ties I noticed a dent similar to the heel of a claw-bar." The offer is refused and denied by the court; to which defendant excepts.

118 Plaintiff objects to question 181 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 181, as follows: "The heel of a claw-bar." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 182 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 182, as follows: "I think it was the first full rail on the bridge." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 183 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 183, as follows: "About twelve or fourteen feet, I think." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 184 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 184, as follows: "The rail that was partly on the dump and partly on the ground." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 185 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in

119 reply to question 185, as follows: "Yes." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 186 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 186, as follows: No, sir; it was shoved over to the south. The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 186½ as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 186½, as follows: "The top of the ties were dented as if struck by a wheel." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 187 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to

prove that the answer would be as stated in the deposition in reply to question 187, as follows: "Partly, but started toward the north and east." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 188 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 188, as follows: "I don't know; didn't observe that carefully." The offer is refused and denied by the court; to which defendant excepts.

120 Plaintiff objects to question 189 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 189, as follows: "Just looked at it—looked over it—walked alongside of it." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 190 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 190, as follows: "The north rails appeared to be in place. Further down there were marks of wheels dropping off the north rail, but some distance after it had dropped off the south rail." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 191 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in reply to question 191, as follows: "The rails on the south side had been tampered with by fish-plates being removed and the spikes drawn, leaving it in such a condition that a train moving over it would crowd the rail out of place and it would become derailed." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 192 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in

121 reply to question 192, as follows: "Lincoln." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 208 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 208, as follows: "I didn't see the fish-plate. I noticed the absence of it." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 209 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 209, as follows: "No, sir." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 210 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in re-

sponse to question 210, as follows: "I didn't see any." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 211 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 211, as follows: "No, sir." The offer is denied and refused by the court; to which defendant excepts. All of said deposition is excluded.

122 The defendant now offers in evidence the deposition of BERT CAMBRIDGE (which is hereafter set out, commencing on page 208) and each and every question propounded and all the answers thereto; which are objected to as per objection of plaintiff on file in the records of this court, which are set out as follows: Plaintiff objects to question 212 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition, which is as follows, in reply to question 212: "Nebraska." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 213 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 213, "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 214 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition, in reply to question 214, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to — 215 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to

123 question 215, "Yes, sir." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 216 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 216, as follows: "Yes, sir; I was with them." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 217 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 217, as follows: "Half past six; right after supper, in the evening." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 218 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 218, as follows: "From six until eight o'clock." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 219 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 219, as follows: "Why, we took the hand car and went up swimming by the Rock Island track." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 210 as incompetent, immaterial, and irrelevant, and which is sustained, and defendant excepts and
124 offers to prove that the answer would be as stated in the deposition in reply to question 220, as follows: "The section boss went with us." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 221 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 221, as follows: "At Rokeby." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 22– as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 222, as follows: "George Richardson." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 223 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 223, as follows: "My brother, me, and the two Foster boys and another Swede fellow; I don't know his name." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 224 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in
125 reply to question 224, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 225 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 225, as follows: "Up the Rock Island track to the overhead bridge." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 226 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 226, as follows: "Yes, sir." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 227 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 227, as follows: "I don't know; just the same as the rest of the track was; run over it; it was all right." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 228 as incompetent, immaterial, and

irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 228, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

126 Plaintiff objects to question 229 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 229, as follows: "Put the hand car on the track and run back over the bridge." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 230 as incompetent, immaterial, irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 230, as follows: "A little before eight, ten, or fifteen minutes, I should judge." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 231 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 231, as follows: "Got on the hand car and run down to Rokeby." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 232 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 232, as follows: "Yes, sir." The offer is refused and denied by the court; to which defendant excepts. All of said deposition is excluded.

The defendant offers in evidence the deposition of Miss LETTIE SIDELL (which is hereinafter set out, commencing on page 221)

127 and offers to read each and every question therein and the answers thereto; to which the plaintiff objects, as per his objections on file in this court, which are as follows:

Plaintiff objects to question 237 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 237, as follows: "About five miles south of Lincoln." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 238 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 238, as follows: "At the same place." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 239 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 239, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 240 as incompetent, immaterial, irrelevant; which is sustained, and defendant excepts and offers to prove

that the answer would be as stated in the deposition in reply to question 240, as follows: "Yes, sir." The offer is refused and denied by the court; to which defendant excepts.

128 Plaintiff objects — 241 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 241, as follows: "Shortly after nine o'clock; somewhere along there." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 242 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 242, as follows: "Yes, sir; my father and brother and another man." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 243 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in her deposition in reply to question 243, as follows: "About ten or fifteen minutes, I guess." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 244 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 244, as follows: "I went southeast until I came to the bridge across Salt creek, and then I went northeast." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 245 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and

129 offers to prove that the answer would be as stated in her deposition in reply to question 245, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 246 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 246, as follows: "Just a few steps." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 247 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 247, as follows: "Yes, I noticed the rail out of place." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 248 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 248, as follows: "Oh, eight or ten inches, I guess." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 249 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to

prove that the answer would be as stated in her deposition in reply to question 249, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

130 Plaintiff objects to question 250 as incompetent, immaterial, and irrelevant, and which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in her deposition in reply to question 250, as follows: "Mrs. Cowdon." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 251 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in her deposition in reply to question 251, as follows: "Oh, half an hour or three-quarters." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 252 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 252, as follows: "They took the people to the train and I went right home." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 253 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 253, as follows: "B. & M., I think." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 254 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in

131 reply to question 254, as follows: "Yes, sir." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 255 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 255 as follows: "Yes, sir." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 256 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 256 as follows: "Mrs. Cowdon." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 257 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 257 as follows: "Found three passes." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 258 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 258 as fol-

lows: "Mr. Cherry." The offer is refused and denied by the court; to which defendant excepts.

132 Plaintiff objects to question 259 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 259, as follows: "I took them home." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 260 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 260: "Yes, sir." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 261 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and offers to prove that the answer would be as stated in her reply to question 261: "Mr. and Mrs. Southwell and Mrs. Southwell's sister." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 262 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 262, as follows: "Going towards the wreck" The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 263 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers

133 to prove that the answer would be as stated in reply to question 263, as follows: "As soon as father came, I gave them to him." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 264 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 264, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 265 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 265, as follows: "At the court-house." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 266 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 266, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 267 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be — stated in her deposition in answer to question 267, as follows: "He was the mail agent on the train that was wrecked, I think." The offer is refused and denied by the court; to which defendant excepts.

All of said deposition was excluded.

The defendant now offers in evidence the deposition of ALONZO CAMBRIDGE (which is set out herein, commencing on page 214)
134 and offers to read each and every question and the answers thereto; to which the plaintiff interposes objections, as per the objections on file in this court, as follows:

Plaintiff objects to question 271 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 271, as follows: "I live in Valparaiso." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 272 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 272, as follows: "I was living at Mrs. W. W. Holmes' place, near Rokeby." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 273 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in reply to question 273, as follows: "Yes, sir." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 274 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 274, which is as follows: "About two miles." The offer is refused and denied by the court; to which defendant excepts.

135 Plaintiff objects to question 275 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 275, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 276 as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 276, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 277 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 277, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 278 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 278, as follows: "A brother." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 279 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to

prove that the answer would be as stated in the deposition in
136 reply to question 279, as follows: "August, 1894." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 280 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 280, which is as follows: "Up swimming in Lincoln park." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 281 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 281, as follows: "It was seven o'clock when we went up." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 282 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 282, as follows: "About 8.20." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 283 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 283, which is as follows: "We were going up swimming that night, and went over to the station at Rokeby and got the boys to go up swimming with the hand car, and we got the hand car and run to this overhead bridge and put the hand car
137 off, and went down to the U. P. railroad and went about a mile north and went swimming and came back and put our car on at the bridge and run out over the bridge to let the train go under, and then left for town again." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 284 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 284, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 285 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 285, as follows: "So far as I know, they were all right. The hand car run over them all right." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 286 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 286, as follows: "No, sir." The offer is refused and denied by the court; to which defendant excepts.

The defendant now offers in evidence the deposition of ERNEST TYRER (which is hereinafter set out, commencing on page 216), and offers to read each and every question therein and the
138 answers thereto; to which plaintiff makes objection as contained in the files of this court, which are as follows:

Plaintiff objects to question 287 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts, and defendant offers to prove that the answer would be as stated in the deposition in reply to question 287, as follows: "I am living with Mr. Lonsdale about six miles south of town." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 288 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 288, as follows: "I was working with them about seven miles south of town." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 289 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 289, as follows: "Yes, sir." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 290 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 290, as follows: "Why, about three months, I should judge; three or four; something like that." The offer is refused and denied by the court; to which defendant excepts.

139 Plaintiff objects to question 291 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 291, as follows: "Yes, sir." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 292 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in reply to question 292, as follows: "Yes, sir." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 293 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 293, as follows: "That was the coat." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 294 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would — as stated in the deposition in reply to question 294, as follows: "Why, it was, I think—I don't know exactly. It was one Sunday I saw it first. He came out there." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 295 as incompetent, immaterial, and

irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 295, as follows: "It was a blue double-breasted
140 coat, and had black buttons on with these patent fasteners—these rings." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 296 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 296, as follows: "They were for the purpose of changing the buttons on the coat." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 297 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 297, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 298 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 298, as follows: "That Sunday he was out visiting." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 299 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 299, as follows: "Why, just a short time; don't know exactly just how long." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 300 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 300, as follows: "Why, it was too large." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 301 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 301, as follows: "Twice that is since he left the farm."

The offer is denied and refused by the court; to which de-
141 fendants excepts.

Plaintiff objects to question 302 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his answer in reply to question 302, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 303 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 303, as follows: "I think he started about the fifteenth of March, if I remember right." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 304 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 304, as follows: "About three months." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 305 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 305, as follows: "I should judge it was about probably a week or a little more before the wreck." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 306 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 306, as follows: "No; not at the time." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 307 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 307, as follows: "The next time I saw him
142 was the night after the wreck." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 308 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in answer to question 308, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 309 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 309, as follows: "Why, he told me one Sunday there—we was walking across one of the lots—he said he guessed farming didn't agree with him any more, and he guessed the railroad company would have to do something for him." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 310 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in deposition of witness in reply to question 310, as follows: "About two weeks, I guess, as near as I can remember." The offer is denied and refused by the court; to which defendant excepts.

Defendant offers in evidence the deposition of WALTER SEIDELL, which is hereinafter set out, commencing on page 219, and offers to reach each and every question therein and the answers thereto; to which the plaintiff objects, as per their objections in file in this court, which are as follows:

Plaintiff objects to question 311 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 311, as follows: "I live five miles southwest of this city."

The offer is refused and denied by the court; to which defendant excepts.

143 Plaintiff objects to question 312 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 312, as follows: "I lived in the same *place* I do now." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 313 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 313, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 314 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 314, as follows: "Lived just about a straight mile northeast of that." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 315 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 315, as follows: "About a half mile, a little more or less." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 316 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 316, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 317 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 317, as follows: "I got there—claim to be the first man—

144 that is, myself and boy and a man by the name of Jack Coulture." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 318 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and defendant offers to prove that the answer would be as stated in his deposition in reply to question 318, as follows: "We heard it." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 319 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 319, as follows: "We had been threshing that day and just got through and was sitting in the dining-room, and we heard a train coming and somebody made the remark, 'There comes Dumpy.' We used to call it 'Dumpy' because it only had two coaches on, and we heard it very plain. All at once it made a terrible racket, as if running on something besides rails, and a kind of

a thud, and that is the last we heard of it until steam began to occur, and then we went out on the porch." The offer is refused and denied by the court; to which the defendant excepts.

Plaintiff objects to question 320 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 320, as follows: "About 9.30, I think." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 321 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to — that the answer would be as stated in his deposition in reply to question 321, as follows: "Why, I looked over in that direction of that bridge, and I could see fire or light under that bridge. I says to the boys, I believe that is a wreck, and somebody says, I guess not, and I says, I am almost sure of it, and we could hear voices also, and I says, Let's go over and see, and my boy says, You hadn't better go, as it might be a 'hold-up,' and I says, I don't care, and we
145 went over there, three of us, and we walked and run and got there just as soon as we could and examined the wreck." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 322 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition, as follows: "Went afoot." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 323 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 323, as follows: "We went southeast a little ways, about half the way, and then northeast until we struck the railroad." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 324 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 324, as follows: "To cross Salt creek." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 325 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in
146 reply to question 325, as follows: "Yes, sir; we jumped off the very place, you might say within—I should say of four or five feet of the rail that was off."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 326 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition, as follows: "I don't remember just exactly whether I did or not in the first place."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 327 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition, as follows: "Well, after we jumped off I saw the wreck, and somebody *called to us—they heard us—and told us for God's sake to* come down, that they were wrecked, and we went down to the rear coach where some of the passengers were, and Mr. Foot was standing down at the baggage car, and he called us to come and help him get a man that was fastened in the wreck, and we went down there and he had a lantern, and I says, Is this all the lantern you got? and he says, Yes, and I says to my boy, You go home and get a lantern. I asked him if there was a bucket to put the fire out in the engine—the coals was burning in the grate and I saw no danger, but I thought the fire ought to be put out, because something might catch fire—and he says, No; there is no bucket; and I have a way of whistleing to my neighbor and I whistled to a man by the name of Van Brewer, on the top of the hill; so I waited a few minutes and instead of it being Van Brewer coming it was my brother and Mr. Saxon, and so we began to chop to get this man out, and we worked at that; in fact we never noticed the fire any more until it started, and we spent all of the time getting him out, and the fire wasn't more than eighteen inches from him when we pulled him out. Then
147 we put him on the hill where the rest of the passengers were near the rear coach. About that time this B. & M. train came along on the B. & M. tracks and stopped, and they came over and we took the passengers over, those that couldn't walk, and put them on the train. Then we came back and went out to the place where it started to run off."

The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 328 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition as follows: "When I got up there Mr. Saxon and Harry Foot, the brakeman, was there. I think that is all that was there when I got there, and we began to examine the track. Well, we found the spikes pulled on the southeast side of the rail; also seen a few—I think, one or two—pulled on the north side, and one or two heads pulled off."

The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 329 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 329, as follows: "This was on the south rail, as I call it—the southeast rail."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 330 as incompetent, immaterial, and

irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 330, as follows: "That is where the rail was misplaced."

The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 331 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 331, as follows: "Yes, sir."

148 The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 332 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 332, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 333 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 333, as follows: "That is what they showed and that is w*a*ht we *a* all agreed."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 334 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated to question 334, as follows: "I seen the spikes were pulled out and I seen the angle bars were gone. The rail, I should judge, was between ten and twelve inches, placed over on the outside, and you could see where the flanges of the wheel had struck the ties, and we looked to see whether we could see any marks on the ties of the claw-bar, which we found. Finally we began to look around for some tool, and I was with the gang, too, who picked up the bar, but I couldn't exactly tell who it was, but I think it was Mr. Saxon, the young gentleman."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 335 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 335, as follows: "Right off the bank about fifteen feet from the place where the rail was taken off, right over the bank to the south, and we found this bar and brought it up, and also found some other pieces, and we tried this bar in the same marks and it fit exactly, and the impression of the bar made in the ties *the*

149 *impression of the bar made in the ties*—the impression—was just as fresh as if done recently, and I seen on the other side, on the north side of the rail, a spike or two pulled, and one or two *off* the heads pulled out, with the heads just as bare as could be."

The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 336 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 336, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

The plaintiff objects to question 337 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 337, as follows: "I should judge for five or six ties."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 338 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 338, as follows: "Went off towards the left—towards the north."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 339 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 339, as follows: "I think until about the end of the second rail only."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 340 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers
150 to prove that the answer would be as stated in reply to question 340, as follows: "The rails began, it seems to me, — lean over partly, and they pushed them out and shoved them out, and it seemed to run right off the bridges."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 341 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 341, as follows: "There was a pair of pinchers, this bar, and I don't remember now of anything else only bolts and washers."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 342 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 342, as follows: "Yes, sir."

The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 343 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 343, as follows: "In the court-room."

The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 344 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his reply in the deposition in answer to question 344, as follows: "No; I don't."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 345 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 345, as follows: "I think it was identified by one man."

151 The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 346 as incompetent, immaterial, and irrelevant. Defendant excepts and offers to prove that the answer would be as follows: "I think it was Shouse."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 347 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 347, as follows: "Seen a colored man, and only one, but whether it was Davis or not I don't know myself."

The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 348 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 348, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 349 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 349, as follows: "I didn't see him go, but seen him come back on the train."

The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 350 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 350, as follows: "Well, after I got home she handed me some passes, one over the B. & M., one over the Rock Island, and one over the U. P."

The offer is refused and denied by the court; to which defendant excepts.

152 Plaintiff objects to question 351 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 351, as follows: "They belonged to C. H. Cherry."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 352 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 352, as follows: "Brought them up — the hote-, the Fremont, I think it is, at the corner of *the* 9th and P streets, I think it is, and he was out at the time and I left them there with the nurse that was nursing Scott, the same nurse that was nursing Cherry—No; it was at the Opelt hotel."

The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 353 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 353, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 354 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 354, as follows: "I think Mr. Cherry had them—handed them to the attorneys there—and I had them in my hands."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 355 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 355 in the deposition, as follows: "Yes, sir; I found a washer."

The offer is denied and refused by the court; to which defendant excepts.

153 Plaintiff objects to question 356 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 356, as follows: "Right under the joint that was misplaced."

The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 357 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in answer to question 357, as follows: "Yes, sir." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 358 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 358, as follows: "Yes, sir; I did." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 359 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply

to question 359, as follows: "Yes, sir; I found them myself." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 360 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 360, as follows: "They laid right under the main ties on the timbers." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 361 as incompetent, immaterial, and irrelevant. The objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 361, as follows: "I don't think it was
154 much over fifteen minutes."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 362 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts — offers to prove that the answer would be as stated in his deposition in reply to question 362, as follows: "I stay from the time I arrived there until two o'clock."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 363 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 363, as follows: "Went next morning about eight o'clock."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 364 as incompetent, immaterial, and irrelevant. Sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 364, as follows: "No, sir; I didn't see that."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 365 as incompetent, immaterial, and irrelevant. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 365, as follows: "No, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 366 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 366, as follows: "Yes, sir; we found spikes and bolts."

The offer is denied and refused by the court; to which defendant excepts.

155 *The offer is denied and refused by the court; to which defendant excepts.*

Plaintiff objects to question 367 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply

to question 367, as follows: "Well, the bolt was unscrewed and fresh as if it was just inscrewed; no rust, only a little at the end, but where the nut seemed to be fastened it was just as bright as could be."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 368 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 368, as follows: "The spikes there—I couldn't say about the spikes any more than remember whether they looked to be old spikes or just drawn out, but we found spikes just the same right there. Examined the spike-holes very closely that night."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 369 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 369, as follows: "Why, the spike-holes seemed to be just the same as a hole naturally would be by a spike being driven in and pulled out."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 370 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in question 370 in said deposition: "No; no dust; just looked as though naturally drawn out. We fitted some spikes in the same holes."

The offer is denied and refused by the court; to which de-
156 fendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 371, as follows: "No; not exactly; she left shortly, right away after we carried the passengers over." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff excepts to question 372 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 372, as follows: "I did."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 373 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 373, as follows: "No, sir."

The offer is denied and refused by the court; to which defendant excepts.

The defendant now offers in evidence the deposition of WILLIAM WEEMS (which is hereafter set out, commencing on page 231), and offers to read each and every question thereto and the answers therein; to which the plaintiff makes the objections as set forth in their written objections in the files of this court as follows:

Plaintiff objects to question 404 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 404, as follows: "City block, Lincoln."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 405 as incompetent, immaterial, and irrelevant. Sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 405, as follows: "In the Webster block."

157 The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 406 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 406, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 407 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 407, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 408 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would — as stated in his deposition in reply to question 408, as follows: "With a fellow by the name of Raymond."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff *excepts* to question 409 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 409, as follows: "Hack-driver."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 410 as incompetent, immaterial, and irrelevant. Objection is overruled. Defendant excepts and offers to prove that the answer would be as stated in his answer in reply to question 410, as follows: "About half past ten or eleven o'clock when we got there."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 411 as incompetent, immaterial, and

irrelevant. Objection sustained. Defendant excepts and
158 offers to prove that the answer would be as stated in his deposition in reply to question 411, as follows: "On a hack."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 412 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 412, as follows: "We got home a little after one, or about one; somewhere along there."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 413 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 413, as follows: "The colored fellow came back with us."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 414 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 414, as follows: "I suppose so."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 415 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 415, as follows: "Saw him out there at the wreck."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 416 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition 416,
159 as follows: "The first time I saw him."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 417 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his reply in his deposition in reply to question 417, as follows: "Yes."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 418 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 418, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 419 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition as follows

in answer to question 419: "He was coming along with a lantern and I got to talking to him while he was walking up to the hack, and I asked him how he was coming in, and he said he was going to walk, and we told him we had a hack there and asked him if he would ride and he said yes, and got in."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 420 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 420, as follows: "It was out."

The offer is denied and refused by the court; to which the defendant excepts.

Plaintiff objects to question 421 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts.

Plaintiff objects to question 421 as incompetent, immaterial,
160 and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 421, as follows: "Well, about the first conversation I had with him was with regard to the lantern. The first thing I asked him for his lantern to help us get out of the cornfield there, and we got to talking about the lantern and then I found out—I think the first way it started I asked him if that was a railroad lantern and he said it was, I think, yes, and he was on the train during the wreck when the wreck happened, and then I told him I didn't think it was a railroad lantern, and he said yes, it was, and then he wanted to know why it didn't break out when the train went off the trestle."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 422 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 422, as follows: "He said he was sitting in the seat with the brakeman and held the lantern in his hand some way when the train went off and it didn't break, and that is the first I knew about his being in the wreck; and I asked him where he had been, and he said he had been out to Kearney selling some horses for Maxey Cobb, and I called his attention to the fact that he couldn't come from Kearney on the Rock Island, and first he could, and then he said he walked to some town out there somewhere and got on, and he also said about having $200.00 of Maxey Cobb's money in his coat pocket, and during the wreck he took his coat off and hung it on the steps of the coach and it burned up, money and all."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 423 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to
prove that the answer would be as stated in his deposition in
161 reply to question 423, as follows: "I spoke to him about it

and said I didn't think they allowed colored men to ride in it, and he said they did, and I have forgot just what he did say."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 424 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 424, as follows: "I don't remember whether he did or not."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 425 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 425, as follows: "I said his name was Washington Davis; I don't remember whether he told his name or not that night."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 426 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 426, as follows: "Came here to L street; L and 11th."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 427 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 427, as follows: "No; I think not. He knew where he was going. We stopped there and watered the horses and he got out."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 428 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers
162 to prove that the answer would be as stated in reply to question 428, as follows: "The next time in the court-house."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 429 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 429, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 430 as incompetent, immaterial, and irrelevant. Objection overruled. Defendant excepts and offers to prove that the reply would be as stated in his deposition in response to question 430, as follows: "Why, he gave the hackman one dollar."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 431 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 431, as follows: "No; I think not."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 432 as incompetent, immaterial. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 432, as follows: "Had kind of a swinging walk; leaned forward considerably when he walked."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 433 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 433, as follows: "Had on dark blue pants and vest."

The offer is denied and refused by the court; to which
163 defendant excepts.

Plaintiff objects to question 434 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 434, as follows: "Kind of a light shirt, kind of a pale blue."

The offer is denied and refused by the court; to which defendant excepts.

Defendant offers in evidence the deposition of WILLIAM LONSDALE (which is hereinafter set out, commencing on page 235), and offers to read each and every question thereto and the answers therein; to which the plaintiff objects as per his written objections on file in this court, set out as follows:

Plaintiff objects to question 435 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 435, as follows: "Why, I live south of the penitentiary now. I used to live on the Marquett- farm."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 436 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 436: "Five miles south, on 27th street, on the Marquette farm."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 437 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove the answer would be as stated in reply to question 437: "I was."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 438 as incompetent, immaterial,
164 and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in reply to question 438, as follows: "Oh, about two or three months, I guess."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 439 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 439, as follows: "Why, he had been there—let me see, I think it was the Sunday before the wreck; am not sure, but think it was."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 440 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 440, as follows: "He had a blue suit on."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 441 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 441: "New."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 442 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 442, as follows: "I didn't see anything."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 443 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 443, as follows: "Had on dark buttons and fastened with rings on the inside."

165 The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 444 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 444, as follows: "Yes, sir; he had a pipe and a picture in the coat pocket."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 445 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in re-

ply to question 445, as follows: "Yes, sir; he had a looking glass—a round looking glass."

The offer is refused and denied by the court; to which defend- excepts.

Plaintiff objects to question 446 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 446, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 447 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 447, as follows: "In the court-room."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 448 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 448, as follows: "From the pocket of his coat."

The offer is denied and refused by the court; to which defendant excepts.

166 Plaintiff objects to question 449 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 449, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 450 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts, and defendant offers to prove that the answer would be as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 451 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in the reply in his deposition to question 451, as follows: "A young man that worked for us by the name of Ernest Tyrer."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 452 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 452, as follows: "Too large for him."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 453 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in reply in his depositions to question 453, as follows: "He *said* brass buttons put on and he would take them off; that he was expecting to use them after a bit."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 454 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be — stated in his deposition in reply to question 454, as follows: "Why, he didn't say."

167

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 455 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 455, as follows: "Yes, sir."

The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 456 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 456, as follows: "He worked for about two months, I guess."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 457 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 457, as follows: "Why, as if lame, as if his feet were sore, sort of shambling walk; didn't walk as if he was all right."

The offer is denied and refused by the court; to which defendant excepts.

Defendant offers in evidence the deposition of FRED LONSDALE (which is hereinafter set out, commencing on page 238) and offers to read each and every question therein and the answer thereto; to which the plaintiff objects, as per his written objections on file on this court, as follows:

Plaintiff objects to question 458 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 458, as follows: "Six miles south."

168

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 459 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 459, as follows: "Farming."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 460 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply

to question 460, as follows: "Six miles south on the farm known as the Marquette farm."

The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 461 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 461, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 462 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 462, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 463 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 463, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

169 The plaintiff objects to question 464 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 464, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 465 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 465, as follows: "Sunday evening before the wreck."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 466 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 466, as follows: "No, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 467 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 467, as follows: "Either Wednesday or Thursday before."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 468 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 468, as follows: "I made the remark to him about his

being so well dressed and everything when he was out of work, and he came around close to where I was sitting and I took hold of it and felt of it and made a remark, and I turned the coat over, and there were rings on the buttons and I asked the reason of that, and he said it was to put brass buttons on when he got a job on the train."

The offer is denied and refused by the court; to which de-
170 fendant excepts.

Plaintiff objects to question 469 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 469, as follows: "William Lonsdale, Ernest Tyrer, and, I believe, Jess Enslow."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 470 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 470, as follows: "He was there, too."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 471 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 471, as follows: "The next evening."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 472 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 472, as follows: "I think about seven o'clock."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 473 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 473, as follows: "At our place—the Marquette farm."

The offer is denied and refused by the court; to which defendant excepts.

171 Plaintiff objects to question 474 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 474, as follows: "Why, I knew he was coming before he got there, and I was out to the blacksmith shed; we have a gate there to go into the barn yard, and he came up to me and we passed the time of day, and I said it was hot, and he said it wasn't as hot as it was down at the wreck last night, or something like that."

The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 476 as incompetent, immaterial, and

irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 475, as follows: "Then he spoke—I asked him, Was you at the wreck? or something like that, and he said yes. He said he had got on the train at Rokeby and was sitting in the hind seat with Harry Foot—don't know whether he said Harry Foot or not, but the brakeman—and he threw his head out of the window and seen the engineer and fireman throw their arms around each other and went over."

The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 476 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 476, as follows: "We walked on across the corral, and Mr. Enslow just came then with his wagon, and we commenced talking about the wreck, and he said that the bolts had been taken off some way and a part unscrewed under the rail, and he took his hands and showed like this (indicating), and showed how a bar was put under the rail and pryed over, and then we went from there up *the* the porch of the house and sat there, and sat there talking about the wreck. He talked about the engineers getting too damned smart and wouldn't stop; that they were afraid of a hold-up."

172 The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 477 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 477, as follows: "No, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 479 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 479, as follows: "I don't remember anything about the lantern now."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 480 as incompetent, immaterial, and irrelevant. Sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 480, as follows: "I heard him tell Jim Malone that he was in the Colored Club room or on the steps of the Colored Club room and heard the crash and went out."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 481 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 481, as follows: "My brother, William Lonsdale, and Ernest

Tyrer had drove about forty rods from the house, and they seen him coming, and they drove back and told me he was coming."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 482 as incompetent, immaterial, and irrelevant. The objection sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition
173 — 482, as follows: "About two o'clock in the morning; the same evening of the wreck."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 483 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 483, as follows: "Saxton."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 484 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 484, as follows: "Yes, sir; his son."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 485 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 485, as follows: "Sort of rolled when he walked."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 486 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 486, as follows: "He had blue pants and blue vest, and some kind of a colored shirt on, and, I believe, a brown soft hat."

The offer is denied and refused by the court; to which defendant excepts.

The defendant now offers in evidence the deposition of O. B. RAMEY (which is hereafter set out, commencing on page 242), and offers to read each and every question therein, with the answers
174 thereto; to which the plaintiff objects, as per his written objections on file in this court, as follows:

Plaintiff objects to question 487 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 487, as follows: "Agent for the Pacific and United States Express Co."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 488 as incompetent, immaterial, and

irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 488, as follows: "Same."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 489 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 489, as follows: "City Lincoln, Nebraska."

The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 490 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 490, as follows: "I did."

The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 491 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 491, as follows: "Yes; Mr. W. G. Roberts and Dr. Crim."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 492 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and
175 offers to prove that the answer would be as stated in his deposition in reply to question 492, as follows: "Yes, sir; we went out on top of the bridge with that intention."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 493 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 493, as follows: "Well, at the south end of the bridge, as if coming on the trestle-work, the south rail showed that it had been removed, and that the wheels of the locomotive run squarely off the end of the rail, striking the ties in a direct line from the end of the rail, showing that the rail must have been moved from there when the wheels reached that point."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 494 as incompetent, immaterial, and irrelevant. The objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 494, as follows: "The south rail coming onto the bridge from the southwest, the track running towards the northeast, it would be the south rail, or the one on your right."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 495 as incompetent, immaterial, and

irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 495, as follows: "To the fourth tie."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 496 as incompetent, immaterial, and irrelevant. Objection is sustained. The defendant excepts and offers to prove that the answer would be the same as contained in the deposition in reply to question 496, as follows: "They had
176 been drawn. The imprints of a claw-bar was right behind the hole in the tie, where the spikes had been drawn straight out of the ties, not bent over by force or anything of that kind."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 497 as incompetent, immaterial, and irrelevant. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 497, as follows: "We particularly noticed that they were fresh."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 498 as incompetent, immaterial, and irrelevant. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 498, as follows:

"No; the spikes had been scattered around there. There were none of the spikes around there, I think, on the south side at the time we were there."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 499 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 499, as follows: "No; there was none there, but some on the trestle-work, but none at the place where the rails had been disconnected."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 500 as incompetent, immaterial, and irrelevant. The objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 500, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

177 Plaintiff objects to question 501 as incompetent, immaterial, and irrelevant. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 501, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 502 as incompetent, immaterial, and irrelevant. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 502, as follows: "Commencing, I think, on the sixth tie, there was a spike pulled, and on the seventh or the eighth tie there was a spike remaining in the tie, but it had been stripped. It was still fresh; the claw-bar had scraped off the head of it, but had not removed the spike. It still remained there."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 503 as incompetent, immaterial, and irrelevant. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 503, as follows: "No; they were drawn out on the north side until you got up pretty close to the end of the rail, and then they were tipped over."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 504 as incompetent, immaterial, and irrelevant. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 504, as follows: "This was the north rail I was speaking of."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 505 as incompetent, immaterial, and irrelevant. The objection is sustained. The defendant excepts and offers to prove that the answer would be as stated in the depo-
178 sition in reply to question 505, as follows: "Well, those spikes were gone down close to the end of the rail, but there was a bolt coming from the 6th tie, fastening the tie to the frame of the bridge where the flange of the engine had hit squarely on top, sinking the top onto the wood and just leaving a mark, and passed on to the next tie and struck that with full force on the next tie, making a mark from the rail right straight forward where the rail should be left."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 506 as incompetent, immaterial, and irrelevant; which objection is sustained, and defendant offers to prove that the answer would be as stated in the deposition in reply to the question 506, as follows: "They were."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 507 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 507, as follows: "Yes, sir; and I said the spikes were removed, commencing at the 6th tie on the north side of that rail; then com-

ing up to the 8th tie the spike still remained in it, showing it had been clinched with a claw-bar—just stripped at the side of the head."

The offer is denied and refused by the court; to which defendant excepts.

179 Plaintiff objects to question 508 as incompetent, immaterial, and irrelevant. The objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in reply to question 508, as follows: "It was still in place, but hardly in line; it had been pressed out, the spikes being removed from the north side." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 509 as incompetent, immaterial, and irrelevant. The objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 509, as follows: "At the north end of the rail." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 510 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 510, as follows: "About 28 feet, I guess." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 511 as incompetent, immaterial, and irrelevant. The objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in reply to question 511, as follows: "You mean in regard to the south or the north side—south or north side." The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 512 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in reply to question 512, as follows: "On the south side the wheel came in contact with the misplaced rail and crowded hard against it until it pushed it over, and the wheel passed over the corner of that rail right at the joint with it and the rail further north, and they were in sort of a 'V' shape where it crossed over the end, and from that point the marks bore off towards the north it seemed to have changed the course of the

180 engine by running off the end of these rails." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 513 as incompetent, immaterial, and irrelevant. The objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 513, as follows: "The eighth tie." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 514 as incompetent, immaterial, and irrelevant. The objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in question 514, as follows: "Yes, sir; I did." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 515 as incompetent, immaterial, and irrelevant. The objection sustained, and the defendant offers to

prove that the answer would be as stated in defendant's deposition in reply to question 515, as follows: "At the coroner's inquest."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 516 as incompetent, immaterial, and irrelevant. The objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 516, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 577 as incompetent, immaterial, and irrelevant. Objection sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 577, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

181 Plaintiff objects to question 578 as incompetent, immaterial, and irrelevant. Objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 578, as follows: "A. The indentation was heavier *was heavier* or deeper from an engine wheel than it was from a car wheel."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 579 as incompetent, immaterial, and irrelevant. The objection is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 579, as follows: "There would not, and it would be in a direct line if she had given away."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 580 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in his deposition, which is as follows, in answer to question 580: "Q. They would if they had been crowded off so as to leave the line. They would go off that way together."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 581 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 581, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 600 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers

182 to prove that the answer would be as stated in the deposition in reply to question 600, as follows: "A. Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 601 as incompetent, immaterial, and

irrelevant. The objection is overruled; to which the defendant excepts, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 601, as follows: "Yes, sir." The offer is denied and refused by the court; to which the defendant excepts.

Plaintiff objects to question 602 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in his deposition in reply to question 602, as follows: "I didn't make the written statement to the company. I made the memorandum, took a pencil and made a little diagram of this, the condition I found on the ties and the way the rails were misplaced, and made a memorandum as to which tie the rail was removed from, etc., and that is what I made my evidence from." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 603 as incompetent, immaterial, and irrelevant. The objection is sustained, and defendant offers to prove that the answer would be as stated in his deposition in reply to question 603, as follows: "Yes, sir." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 604 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 604, as follows: "No, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 606 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers
183 to prove that the answer would be as stated in his deposition in reply to question 606, as follows: "Agents for the Pacific and United States Express Company." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 607 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 607, as follows: "No, sir; never." The offer is denied and refused by the court; to which defendant excepts.

The defendant offers in evidence the deposition of Mrs. NETTIE COLLIER (which is hereinafter set out, commencing on page 260), and offers to read each and every question therein and the answers thereto; to which the plaintiff objects, as per his objections on file in this court, as follows: To question 613 plaintiff objects as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 613, as follows: "Lincoln, Nebraska." The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 614 as incompetent, immaterial, and irrelevant. The objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in

reply to question 614, as follows: "In Lincoln." The offer is denied and refused by the court: to which defendant excepts.

Plaintiff objects to question 616 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in the deposition in reply to question 615, as follows: "In the Rock Island wreck, the Rock Island train, I believe." The offer is denied and refused by the court; to which defendant excepts.

184 Plaintiff objects to question 616 as incompetent, immaterial, and irrelevant; which is sustained, and defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 616, as follows: "I most assuredly was."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 617 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in answer to question 617, as follows: "I couldn't say as to that; I wasn't very long."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 618 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 618, as follows: "A few minutes, I should judge."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 619 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in answer to question 619, as follows: "Well, I seen a good many, but couldn't call there at the time. I remember the Seidells."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 620 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 620, as follows: "My sister-in-law."

The offer is denied and refused by the court; to which defendant excepts.

185 Plaintiff objects to question 621 as incompetent, immaterial, and irrelevant; which is sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 621, as follows: "I seen just one."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 622 as incompetent, immaterial, and irrelevant; which objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition

in reply to question 622, as follows: "Well, it was a few minutes after I was taken out that I seen him on the hill."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 624 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 624, as follows: "I couldn't say just how long."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 625 as incompetent, immaterial, and irrelevant; which objection is sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 625 as follows: "Well, there was so many got out of the car and I was pretty excited; I should judge I seen him about as quick as I seen any of them."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 626 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and
186 offers to prove that the answer would be as stated in her deposition in reply to question 626, as follows: "The first time I seen him was when my sister-in-law had her hands on his shoulder and requested him to go down and help the sufferers, and what made me notice it was she had her hands on his shoulder, and then she asked him to go down and help the sufferers, and that was when I seen the colored man."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 627 as incompetent, immaterial, and irrelevant. Objection is overruled. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 627, as follows: "She asked him to go down, for God's sake, and help those suffering."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 628 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 628, as follows: "Gave a peculiar yell and went down to the train."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 629 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 629, as follows: "Mrs. Rutherford."

The offer is denied and refused by the court; to which defendant excepts.

187 Plaintiff objects to question 630 as incompetent, immaterial, and irrelevant. Objection is sustained. Defendant excepts,

and defendant offers to prove that the answer would be as stated in her deposition in reply to question 630, as follows: "Yes, sir."

The offer is denied and refused by the court; to which defendant excepts.

Plaintiff objects to question 631 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 631, as follows: "Col. Bills was one, and there were others, but I don't remember their names."

The offer is refused and denied by the court; to which defendant excepts.

Plaintiff objects to question 632 as incompetent, immaterial, and irrelevant. Objection sustained. Defendant excepts and offers to prove that the answer would be as stated in her deposition in reply to question 632, as follows: "Yes, sir; Mr. Foss."

The offer is denied and refused by the court; to which defendant excepts.

It is admitted that the witnesses whose depositions are offered in evidence do not reside in Thayer county and that they are not now in Thayer county at this time.

188 Thereupon the defendant called as a witness C. H. CHERRY, and offered to prove by the said witness just called that on the night of the 9th of August, 1894, the witness was on the train at the time it was derailed as U. S. mail clerk and was riding in a postal car of said train; that he had in his possession and in the pockets of his clothes three passes, one issued by the defendant, one by the Union Pacific Railway Company, and one by the B. & B. Railway Company, and from twenty to fifty — in paper money; that said passes and all of said money were in his clothes while he was in the train at the time said train was thrown from the track and wrecked; that the witness did not deliver said passes or either of them or any of said money to any person; that the witness was fastened in his car by said wreck and was prostrated thereby, and was afterwards taken from said wreck by other persons, who cut their way into said car or to the said witness with axes and saws; that these passes and money were in the witnesse's pockets at the time of the derailment, and were next seen by him when delivered *him* to him in the city of Lincoln by Walter Siddell, the father of Lettie Seidell, a witness in this case; that the witness Cherry did not go and was not upon the defendant's railroad at any point for several weeks thereafter; that this witness has for eight or ten years last past been a mail clerk, traveling continuously during said years on many of the leading railroads of the U. S., and is well acquainted with the speed at which the trains on most of the leading roads are run and is well qualified and competent to estimate the speed of trains and knows the speed at which the train at all times in question was run; that the train at the time of the accident and for twenty minutes prior thereto was running not to exceed forty miles an hour, and that

189 nothing unusual or uncommon occurred in the running or operation of said train until it reached the point from which

the rail mentioned by the witness Bishop had been removed, and that it is usual and customary and had been for six or eight years immediately prior thereto for passenger and mail trains to run at, on all the leading railroads of the U. S., from forty to sixty miles per hour between stations, and the wreck in question occurred between stations; that the first station west was about three miles from the wreck and the first east about four and a half miles, and that the passes and money referred to above were stolen from the pockets of said witness while he was in said wreck by some person or persons unknown to the witness; that said railroad at the place of the wreck and at all other places was at the times of the wreck in the best condition and was sound in every way.

And that said railroad and bridge at all places were in the best possible condition at all times in question, and the rails and ties and all other appliances used therein or maintained thereon during all the times in question were of the best, safest, and strongest used in the construction or maintainance of railroads or bridges, and that stronger or better ones could not have been obtained at any time; that there was not at the time of said wreck or derailment a rotten or defective tie, stringer, pile, or bridge timber or appliance of any kind in or used upon or about or connected with said railroad or bridge; that said bridge and track at the time of the wreck and the place thereof and for a half a mile on either side thereof was straight on a tangent, and was in perfect alignment and surface and in the best condition; that if the rail referred to above had not been removed by some person or persons before the train reached
190 it the said rail would have remained in its proper position and safely carried the train over it running at the greatest rate of speed possible, even though the spikes, angle bars, and bolts had been removed therefrom; that the witness the day following the wreck took the claw-bar that had been found near by the wreck and within a few minutes thereafter and placed the same on the marks or indentations made on the ties as stated above, and that the said claw-bar fitted same marks and indentations perfectly, and that the said marks and indentations were of the same size as the heel of said claw-bar; that the witness on the day following the wreck took the monkey-wrench which had been found a few feet from the place of the wreck a short time after the wreck and placed the same on the nuts that were found immediately about the place of the wreck, and that said wrench was adjusted so as to fit the said nuts and each of them, and that said wrench had not been changed in any way from the way it had been found soon after the wreck to the time this witness placed the same on the nuts as stated above.

That the train in question at the time in question was thrown from the track and bridge and derailed by reason of the rail having been displaced at the west end of said bridge and on the south side of said bridge. The plaintiff objects to this testimony as incompetent, immaterial, and the objection is sustained; whereupon the defendant excepts to the ruling of the court.

Whereupon the defendant called as a witness Miss LETTIE SEIDELL, and offers to prove by the said witness just called that on the night of the 9th of August, 1894, at a point about three-fourths of a mile west from the place where the wreck occurred and about two hours after the wreck occurred, she found three railroad passes issued by the C., R. I. & P. Railway Company, the B. & M. Railroad
191 Company, and the U. P. Railroad Company to C. H. Cherry, being the same passes referred to by the offer in evidence of witness Cherry and Walter Seidell, and that she gave said passes to Walter Seidell; that she went to the place of the wreck in question within fifteen minutes after the wreck occurred and saw plainly that the rail on the west end of the bridge and on the south side had been misplaced before the train reached it; that she saw and examined the nuts and bolts found at the wreck and that they were in first-class condition and in perfect order; that the thread of the nuts and bolts were in good condition and were not stripped to any extent, and that they were found at the west end of the bridge within a few minutes after the wreck occurred; that she saw and examined the bridge timbers, ties, rails, and all other appliances and appurtenances connected with the railroad and bridge and that they were all solid, sound, and in good condition; that there was no tie or timber or appliance that was defective, rotten, or out of repair in any way, and that the ties and bridge timber were of oak and were strong and substantial in every way; that she saw the marks on the ties showing that the spikes had been removed or pulled therefrom by some person with the use of a claw-bar or some other hard instrument; that she saw a colored man by the name of George Washington Davis at the wreck when she first arrived there, and that he afterwards and before she found the passes, as stated above, started west on the defendant's track in the direction of the place where she afterwards found said passes.

The plaintiff objects to such evidence as incompetent, immaterial, and irrelevant and not within the issues. The objection is sustained; to which ruling the defendants duly except.

Whereupon the defendants call as a witness J. H. MCKINSTREY, and offer to prove by this witness that at the time of the wreck
192 in question he was section foreman for the defendant of the section on which the wreck in question occurred, and that it was his duty to look after and maintain the railroad track at all places in question, and that he had control and charge of said work on said section, including the place — the wreck, at the time of and for several months prior thereto, and on every day during said time he inspected and examined the railroad at the place of the wreck and for a long distance on either side thereof, as it was his duty to do; that on the evening of the wreck in question and at about five forty-one to six o'clock p. m. he personally and carefully examined and inspected the railroad at all points in question and at the place of said wreck; that he went to those points at the time last above stated in the discharge of his duty; that said railroad and track, bridge, and trestle-work and every part of them and each of them were on the

evening of said wreck and immediately prior to said wreck in first-class condition and perfect order; that the ties, rails, bridge, stringers, bridge timbers, angle bars, fish-places, nuts, bolts, and rails and each of them and everything connected therewith were constructed in the best manner and of the best material and were of the best quality and character in use in the U. S.; that the alignment of said bridge and track at all places was perfect; that there was not at any of said times a rotten or defective tie, bridge timber or tie, or other timber, rail, angle bar, fish-plates, nut, or bolt or other appliance connected with or used on said railroad at the place in question, and that said railroad and bridge and each of them were constructed and maintained in the best possible manner and condition so as to insure and protect to the greatest extent the safety of passengers and persons passing over said railroad and of freight and the U. S. mails being transported thereon; that the witness on the night of
193 the wreck, and within two hours thereafter, went to the place of said wreck and examined the scene, as well as the track, railroad bridge, trestle, and all the appliances and the work at the place of the wreck and for a long distance on either side thereof; that at said time he examined the ties, bridge timbers, stringers, ang*el* bars, fish-plates, nuts, bolts, and everything around the said railroad at the place of said wreck and for a long distance on either side of the wreck, and that there was not at said time nor at any other time a rotten or defective tie, bridge timber, stringer, rail, ang*el* bar, spike-bar, fish-plates, bolt, nut, or other appliances or fixtures on or connected with the said railroad; that in the examination of said premises above the witness saw that the rail at the west end of said bridge and on the south side *that it* had been misplaced by some person or persons; that the fish-plates and angle bars, nuts, and bolts had been removed therefrom by some person before the said wreck occurred, and that the said nuts, bolts, and angle bars were found at the west end of said bridge and were in first-class condition; that the threads on the bolts and nuts were perfect and in good condition and had not been slipped in any way, and that in the opinion of this witness the said nuts had been removed from said bolts and said bolts from the angle bars and rails before this wreck occurred; that this witness and the defendant used and observed all possible care in maintaining said railroad and all its parts and everything connected therewith, and this defendant could not have known by the exercise of the greatest care that the said rail had been misplaced before said wreck occurred, or that the said nuts, bolts, angle bars, or fish-plates, or either of them before that time, and that it could not have prevented said wreck by the exercise of the greatest care, caution, and circumspection.

194 The plaintiff objects to this evidence as incompetent, immaterial, and irrelevant and not within the issues of this case. The objection is sustained, and the defendant excepts to the ruling of the court.

The defendant now offers to prove by the witness R. W. DAY that the railroad and said bridge were in all respects such as *is* accepted

by and were in general use and found to be sufficient and approved by the best and most skillfully managed railroads in the U. S.; that the condition of the material of which said bridge was constructed and maintained the defendant exercised and used the greatest possible care; that the plan and construction and maintainance of said railroad track, bridge, and the ties, rails, sleepers, bridge timbers, and all of the parts thereof were of the very best kind and character, and were such as the most carefully, prudently, and skillfully managed railroads in the U. S. exercise and observe in said matters; that the ties, rails, bridge timbers, fastenings, and everything connected therewith at the place of said wreck and at all other places were in all respects such as had been found sufficient by the most skillfully and prudently managed railroads in the U. S., and that said railroad track and bridge and the ties, rails, bolts, fastenings, and appliances connected therewith were in all respects sound at all times in question and were in perfect condition; that the said railroad and bridge and the ties, bridge, rails, fish-plates, and all the appliances and fastenings thereof were daily inspected by the employees of the defendant in the usual and proper manner and in the manner in use on the best managed railroads in the United States; that the defendant observed the greatest care in establishing and keeping employees and servants to care for, inspect, and keep said rail-
195 road and bridge and everything connected therewith in proper condition; that all of said employees were skilful and careful in their work, and were men of good judgment and were qualified to perform their duties in caring for and maintaining said railroad.

To which evidence the plaintiff objects as incompetent, immaterial, and irrelevant and not within the issues of this case. The objection is sustained by the court; to which ruling the defendant duly excepts.

The defendant called as a witness GEORGE J. BISHOP, and offered to prove by the witness that about eight o'clock on the morning of August 10th, 1894, this witness was at the place where the train in question was derailed and wrecked at the time in question, and that he made a thorough and complete investigation of the railroad bridge trestle-work at the place where said wreck occurred, including the bridge and trestle-work at the place of said wreck and on either side thereof, as well as the ties, rails, bridge timbers, angle bars, spikes, nuts, bolts, and everything connected with or constituting a part of the railroad trestle and bridge and track; that he found at the west end of the trestle-work the south rail of the track had been removed from its usual and proper place south four or five inches; that the west end of said rail had been unfastened and disconnected from the rail immediately west therefrom by the nuts, bolts, and angle bars connecting and holding said rails together being removed; that the bolts passing through the angle bars and rails had been taken out; that the nuts on said bolts had
196 been unscrewed and removed in the proper way from said bolts, and that the threads on said bolts were in perfect condition and order; that if said bolts and nuts had been removed or

forced from their proper position by the running or operation of the train the bolts would have been broken or the threads thereon stripped; that none of the threads on the bolts were stripped, and that none of the bolts were broken or out of condition in any way; that immediately east of the last rail in place on the west end of said bridge and on the south side thereof and in the place where the rail — had been removed had been located before it was moved and on the top of the ties the witness saw marks and indentations extending eastwardly in a direct line with the flange side of the rail which had remained in place west therefrom, and that said indentations were at the proper gauge to be made by the south wheels of the engine and train when the north wheels of the train and engine were on the north rail and in their proper position; that the witness at the time stated above carefully examined the spike-holes along the line where the rail mentioned above as having been removed had been removed from its place, as well as the spikes on all of the parts of said bridge and track and at the place of said wreck and for several feet west and east therefrom.

That he observed that 15 to 20 spikes holding the rails at the west end of said bridge and where the wreck occurred had been removed and pulled from the ties; that he saw marks and indentations of a claw-bar on the ties at the side of the holes from which the spikes had been pulled as stated above; that the holes were straight, smooth, and clear from dust and tear and showed plainly the spikes had been pulled therefrom by some person or persons with a claw-bar, the usual appliance for pulling spikes, within a few hours prior to the time of the examination; that the
197 witness in said examination saw on the stringer on said bridge under the said removed rail marks of the claw-bar where it had been placed when the rail mentioned above as being out of place had been forced from its proper position after the removal of the spikes and angle bars; that the angle bars were pieces of iron about twenty inches long and about two and a half inches wide and about half an inch thick, that are used in holding together the ends of rails forming a "track;" that the angle bars are placed on the sides of the rails and at the ends thereof where the ends of the rails come together and are held in their place by bolts of the kind mentioned above being placed through the angle bars and rails and fastened in that position with nuts; that the nuts on these bolts cannot be removed without breaking them, unless they are removed by a person and then unscrewing the nuts; that if they are removed in any other way the nuts will be broken or the threads thereon stripped; that in the opinion of this witness the rail mentioned above as having been misplaced had been misplaced by some person or persons before the train or engine reached that part of the track, and that the said rail could not have been misplaced as stated above without the angle bars, nuts, and bolts thereon being removed; that this witness assisted in and had control of the construction and maintainance of the railroad track, bridge, and trestle-work at all places and at all times in question; that on the afternoon of the second day imme-

diately before said wreck the witness in the discharge of his duty, as an employee of the defendant, carefully examined and inspected the railroad track, bridge, and trestle and all appliances thereto, and the timbers thereof, including the ties, rails, spikes, nuts, bolts, angle bars, and every other part and parcel thereof; that the said ties were of oak and were in first-class condition in every respect
198 and sound in every way; that the bridge timbers and all materials thereon were in the best condition and of the best quality and were sound and perfect in every way; that the rails on the said bridge were of the best character and were sound in every way and were of the best quality and kind that has ever been used in the construction and maintainance of railroads; that said railroad at the place of the wreck and at all other places was at the time of the wreck in the best condition and was sound in every way, and that said railroad and bridge at all places were in the best possible condition at all times in question, and the rails and ties and all other appliances used therein or maintained thereon during all the times in question were of the best, safest, and strongest used in the construction or maintainance of railroads or bridges, and that stronger or better ones could not have been obtained at any time; that there was not at the time of said wreck or derailment a rotten or defective tie, stringer, pile, or bridge timber or appliance of any kind in or used upon or about or connected with said railroad or bridge; that said bridge and track at the time of the wreck and the place thereof and for a half a mile on either side thereof was straight on a tangent, and was in perfect alignment and surface and in the best condition; that if the rail referred to above had not been removed by some person or persons before the train reached it the said rail would have remained in its proper position and safely carried the train over it running at the greatest rate of speed possible, even though the spikes, angle bars, and bolts had been removed therefrom; that the witness the day following the wreck took the claw-bar that had been found near the wreck and within a few minutes thereafter and placed the same on the marks or indentations made on the ties as stated
199 above, and that the said claw-bar fitted same marks and indentations perfectly, and that the said marks and indentations were of the same size as the heel of said claw-bar; that the witness on the day following the wreck took the monkey-wrench which had been found a few feet from the place of the wreck and a short time after the wreck, and placed the same on the nuts that were found immediately about the place of the wreck, and that said wrench was adjusted so as to fit the said nuts and each of them, and that the said wrench had not changed in any way from the way it had been found soon after the wreck to the time this witness placed the same on the nuts as above stated.

That the train in question at the time in question was thrown from the track and bridge and derailed by reason of the rail having been displaced at the west end of said bridge and on the south side of said bridge.

Plaintiff objects to this testimony as incompetent, immaterial.

The objection is sustained; whereupon the defendant excepts to the ruling of the court.

Defendant offers to prove by this witness the facts as stated in the second and third paragraphs of its answer filed herein and each of them; to which the plaintiff objects as incompetent, immaterial, and irrelevant and indefinite. The objection is sustained, and defendant excepts.

Thereupon the defendant called as witnesses C. J. Bills, T. L. Park, C. H. Cherry, R. W. Day, A. B. Schrantz, Andy Linquist, J.
200 H. McKinstry, Mrs. John Ruchlin, Dan'l Sellman, P. White, A. J. Hart, James O'Shea, M. Ryan, J. C. Langtry, J. H. Hoppe, George Saxton, William Saxton, Walter Seidell, Fred Foster, Fred Lonsdale, D. B. Burley, D. H. Monkhouse, Ira Shortribs.

Defendant offers to prove by these witnesses just called the facts stated in the second and third paragraphs of their answer, except that portion of third paragraph of said answer beginning with the following words: "As to whether said plaintiff was, on the 10th day of November, 1894, or at any other time, the duly appointed and qualified administrator of the estate of John R. Matthews, the deceased, the defendant has not knowledge or information thereof sufficient to form a belief."

COURT: There is not included in this offer any evidence designed to show that plaintiff's decedent, or John R. Matthews, was not injured and killed in the wreck on defendant's railroad about August 9th, 1894, nor is there included in this offer any evidence tending to show John R. Matthews was not on the train.

Plaintiff objects to this offer of defendants as incompetent, immaterial, and irrelevant, and because the offer is not upon the
201 issues in this case. The objection is sustained by the court, and the defendants duly excepts to said ruling of the court.

Mr. EVANS: Are we to understand that the court will not admit any evidence relating to the operation and maint*ain*ance and construction of the railroad or train in question at any time unless it shows or tends to show that the deceased was not injured while being transported—was not *not* injured or killed while being transported over the defendants' railroad as a passenger?

COURT: By anything connected with the management of the road.

Mr. EVANS: And will not admit any evidence showing or tending to show the defendants' *was* not guilty of negligence or want of care in the operation of the said railroad or train or either of them or in the maint*ain*ance or construction of either of them?

COURT: Such evidence will not be admitted.

To all of which the defendant excepts.

Defendant rests.

The evidence being all in, the case is argued to the jury by respective counsel and submitted on the instructions of the court.

Stipulation.

The following stipulation was made and entered into between the parties in this case in my presence this day:

"It is hereby stipulated and agreed by the parties to this suit that the signing of the depositions by the several witnesses respectively shall be waived, and that the depositions of witnesses taken pursuant to the notice hereto attached shall be admitted in evidence as the depositions of such witnesses without their signatures thereto."

202 P. H. MATTHEWS, of lawful age, being by me first duly examined, cautioned, and solemnly sworn as hereinafter certified, deposeth and sayeth as follows, viz:

Examined by JOHN M. STEWART:

Q. Where do you reside?
A. In Lincoln.
Q. How long have you lived here?
A. Since the 13th of August, 1895.
Q. What is your occupation?
A. I am a traveling salesman for C. B. Havens & Co., coal dealers.
Q. What relation, if any, are you to James R. Matthews, deceased, or were you?
A. John R. Matthews. I am his brother.
Q. Do you remember the circumstances of the wreck that occur-ed on the Chicago, Rock Island and Pacific Railroad Company on August 9th, 1894, just south of this city?
A. I do.
Q. Where were you at that time?
A. Near Sterling, Kansas.
Q. Was that your home at that time?
A. Yes, sir.
Q. Prior to that wreck what was your brother's, John R. Matthews', business or occupation?
A. Traveling salesman for C. B. Havens & Co.
Q. About how long had he been with that company in that capacity?
A. He had been traveling for the Pomeroy Coal Company, I think, since '90; August of '90, I think, he went to work for the Pomeroy Coal Company, and when C. B. Havens & Co. bought them out, in '91, he went to work for C. B. Havens & Co.

Q. Where were his headquarters?

203 A. He had a room and lived in Lincoln. His headquarters was at Omaha—that is, his—the headquarters of the firm.
Q. The point that he traveled from?
A. Yes, sir; they have their headquarters there.
1 Q. Have you seen or heard anything from your brother since August 9th, 1894—since that day?
A. No; I haven't.
Q. How many members are there or were there at that time, in your brother's family?

2 A. There were six at the time of his death.
3 Q. Who were they?
A. Father, mother, and four sons.
4 Q. Are they all living now?
A. My mother is dead.
5 Q. When did she die?
A. She died on the 26th of February, 1895.
6 Q. How old was she at the time of her death?
A. Near 55.
Q. How old is your father now?
A. About 59 or 60.
7 Q. And about what are the ages of the other members of the family?
A. My oldest brother is nearly 31.
8 Q. Where does he live and his occupation?
A. Vancouver, Washington. He is a clerk.
9 Q. Married or single?
A. Married.
10 Q. Go on and tell about the other members of the family.
A. The youngest brother is about 27; I think he will be 27 this winter. He is teaching in Sterling, Kansas; single.
11 Q. Teaching and going to school?
A. Yes; he is doing about enough of teaching to pay his expenses. He is carrying three or four studies.
204 Q. Are you a single man?
A. I am a single man.
Q. How old was your brother, John R. Matthews, when he was killed?
A. I think he lacked about two months of being 28 years old; I am not sure about that, but he either lacked two months of being 28 years old or 27 years old.
Q. Was he a man in good health at the time of his death?
A. Yes, sir.
12 Q. What was his habits as to industry and temperance, etc.?
A. He is very industrious, and he was very temperate in his habits. He did not drink, smoke, or chew.
13 Q. About what was he earning—had he been earning prior to his death?

Counsel for defendant objected. No foundation has been laid; incompetent and immaterial.

A. The last I know positively of his wages he was getting $90 a month and expenses.
14 Q. What is your father's occupation?

Counsel for defendant objected to — as immaterial.

A. He is a clerk in a lumber yard.
15 Q. What is the condition of his health—has it been?

Counsel for defendant objected as incompetent and immaterial.

A. His health has been good up to six months after my brother's death; he has not been in very good health.

Counsel for defendant moved to strike out the last answer of witness as incompetent, immaterial, not an element in this case, and not responsive to the question put to him.

Q. John R. Matthews was single at the time of his death?

A. He was.

Q. Never been married?

205 A. No, sir.

Q. Have you a photograph of your brother, John R. Matthews?

A. I have.

16 Q. Let me see it, will you? (Witness produces photograph and hands it to Mr. Stewart.) I hand you this photograph and ask you to indicate which one of those pictures is the photograph of John R. Matthews.

Counsel for defendant objected as incompetent, immaterial, assuming that one of the likenesses is proven to be a likeness of John R. Matthews, leading and suggestive.

A. That one to the right.

17 Q. I will ask you to state, if you know, about how long before his death that was taken, as near as you can.

A. I don't recollect how long. As much as a year anyway, I think.

18 Q. State whether or not that is a good likeness of your brother.

Counsel for defendant objected as incompetent, immaterial.

A. It is a very good likeness.

Mr. STEWART: We will ask to have this identified and attached to the deposition by the notary and offered in evidence as part of his testimony.

Counsel for defendant objected as incompetent, immaterial, irrelevant, and not an element of damages in this case, and not an identification of John R. Matthews or a description of him.

(Photograph here identified by the notary public. Exhibit "A.")

Witness excused.

206 J. C. PUETZ, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows:

Examined by JOHN M. STEWART:

Q. Where do you reside, Mr. Puetz?

A. Lincoln, Nebraska.

Q. What is your occupation?

A. Traveling salesman.

Q. How long have you been in Lincoln, here?

A. About nine or ten years; I don't remember exactly.

Q. Do you remember the circumstances of the wreck that occurred on the Chicago, Rock Island and Pacific Railroad Company's line on August 9th, 1894?

A. I do.

Q. Just south of the city?

A. I do; very decidedly.

Q. Where were you at the time of that wreck?

A. I was on that train.

Q. That was wrecked?

A. Yes, sir.

Q. Where did you get on?

A. At Fairbury, I think.

Q. What time of the day or night did the wreck occur?

A. About 9.30.

Q. In the evening?

A. Yes, sir; somewhere about that time.

Q. At what place had the train stopped prior to the wreck—the last stop?

A. Martell, I think.

1 Q. About what rate of speed was the train going at the time of the wreck, as near as you can tell?

Counsel for defendant objected for the reason witness has not shown himself competent to testify on this subject, no proper
207 foundation laid, and immaterial.

2 A. Oh, the train was going very fast, probably 50 to 60 miles an hour.

Q. Have you been accustomed to traveling on railroad cars?

A. Yes, sir.

Q. For how long?

Counsel for defendant objected as immaterial, incompetent. Witness has already been allowed to testify as to his judgment as to the rate of speed; not proper for the purpose of laying any foundation at the present time.

A. The last 15 or 15 years; along about there.

3 Q. Just describe, Mr. Puetz, briefly the manner in which *in which* the train was wrecked and how it appeared after the wreck.

Counsel for defendant objected, not sufficient foundation laid; incompetent and immaterial, assuming facts as proven which the witness has not testified to, and calling for a conclusion of the witness and not a statement of facts.

A. Why, the train left the track, as it seemed to me, at the approach of the trestle, which was a trestle crossing of the Union Pacific and B. & M., a little south of Lincoln.

Q. How high was the bridge or trestle from the ground?

A. I don't know.

Q. Have you any idea at all?

A. Yes, sir; it seems to me about thirty or thirty-five feet; perhaps thirty feet, anyway, and we jolted over the ties a long while—

seemed to me a long while—lights all went out and it threw me from my seat.

208 Counsel for defendant moved to strike out the answer of witness as incompetent, immaterial, and not an element of damages in this case; object to filing all of the answers save the first sentence.

Q. Which coach were you in?
A. I was in the rear coach at the time of the wreck.
Q. How many coaches were there?
A. Two cars.
Q. What was the one in front of the one you were in?
A. Combination; fore part given up to baggage and mail, and the rear part was a smoking car.
Q. What became of that car after the wreck; do you know?
A. It was burned up.
Q. Took fire right there and burned up?
A. Yes, sir.
Q. What became of the rear coach?
A. It was burned up.
Q. Had you been in the smoker after you got on the train at Fairbury?
A. Yes, sir.
Q. About what time and how long before the wreck occur-ed?
A. I got on the train at Fairbury and seated myself in the rear car, and soon after the train left the depot I went forward to the smoking car, and remained in the smoking car until shortly before the time of the wreck, when I again left it.
4 Q. About how many passengers were there in the front car?

Counsel for defendant objected as immaterial, not an element of damages in this case, not an issue under the pleadings in this case.

Q. How many passengers were there in the front car?
209 A. Seemed to me there were seven people in that car when I left it—no; there were eight people in that car when I left it.
5 Q. Did you meet John R. Matthews, the deceased, that evening on that train that time?

Counsel for defendant objected as suggestive, incompetent, immaterial; no foundation laid.

A. I saw him on the train.
Q. I will ask you, first, if you knew him—John R. Matthews.
A. Yes, sir.
Q. And where was it you saw him?
A. I saw him in that car after I entered it—smoking car.
Q. Did you have any conversation with him?
A. Yes, sir; I was talking with him that evening.
Q. And where was he when you left the car?
A. He was still sitting in the same seat.
Q. Which part; in the rear?

A. Rear seat, right-hand side, directly opposite to the one I sat in.
Q. And was that before or after the train passed Martell?
A. Before.
Q. And how long, about?
A. Only a few minutes.

6 Q. You may look at Exhibit "A" (hands witness said exhibit), the picture on the right-hand side of that card, and state whether you recognize that as the photograph of John R. Matthews that you saw that evening on that train.

Counsel for defendant objected as not proper method of identification.

A. That looks very much like him.
Q. Just give a description of John R. Matthews, briefly, as to his appearance.

210 Counsel for defendant objected as incompetent, immaterial, calling for a conclusion of witness, no proper or sufficient foundation laid for the introduction of such testimony by this witness.

7 A. Why, he was a man of medium tall statute; man weighed perhaps 150—160 possibly. I should say perhaps 25 or 26 years of age; his complexion was dark, he wore a mustache; dressed in dark clothes, as near as I can recollect.
Q. Did you see whether any of the persons in that front coach got out after the wreck?
A. I did not.
Q. Were you there while the coach was burning?
A. Yes, sir.

8 Q. Was there any attempt made to get the parties out?

Counsel for defendant objected as immaterial, not an element of damages in this case, nothing that can be attributed to the defendant, either as an act of omission or commission.

A. Yes, sir.

9 Q. What was done?

Counsel for defendant objected as immaterial, not an element of damages in this case, nothing that can be attributed to the defendant, either as an act of ommission or commission.

A. The crew and others that came to the scene of the wreck worked to get the people out of the front compartment of the car; succedded in getting out the baggageman and mail clerk.
Q. They were alive when taken out?
A. Yes, sir.

10 Q. What about the persons in the smoking part?

211 Counsel for defendant objected as immaterial, not an element of damages in this case, nothing that can be attributed to the defendant, either as an act of ommission or commission.

A. I did not notice. They was not in there; in fact they could not; the fire was getting too much headway.

Cross-examination.

Examined by R. J. GREEN:

Q. Where was it, Mr. Puetz, that you left the smoking compartment of that train?

A. Shortly before we reached Martell.

Witness excused.

By agreement of the parties hereto, by their attorneys, the further taking of this deposition was adjourned to Monday, October 12th, 1896, at 9 a. m.

LINCOLN, *October 12th*, 1896.

Pursuant to adjournment, and both parties being present and the witness Walton G. Roberts, G. L. Horn also being present, the further taking of this deposition was continued, as hereinafter set forth.

[SEAL.] J. E. FERRIS,
Notary Public.

WALTON G. ROBERTS, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Examined by JOHN M. STEWART:

Q. Give your name, age, place of residence, and occupation.

A. Walton G. Roberts, Lincoln, Nebraska; undertaker.

Q. How long have you been in the undertaking business in Lincoln?

A. Almost nine years for myself.

Q. Do you remember the circumstance of the wreck on the
212 Chicago, Rock Island and Pacific railway line little south of this city on August 9th, 1894?

A. I remember there was a wreck there; yes, sir.

Q. Were you at the scene of the wreck? If so, when—how long afterwards?

A. I was at the scene of the wreck; yes, sir.

Q. How long afterwards?

A. I was the next morning.

Q. Were you there in a professional capacity?

A. Yes, sir.

Q. Were the remains of any person taken out from the wreck?

A. Yes, sir.

Q. How many?

A. Eleven.

Q. What were the condition of those bodies?

A. Some of them were badly charred and some of them were not. Two of them were consumed by the heat and flames except some of the skulls and a few bones.

Q. What was done with those remains?

A. They were taken to my place.

Q. Here in the city of Lincoln?

A. Yes, sir.

Q. And what was done with them there?
A. They were prepared for burial.
Q. Did you bury them—conduct the service?
A. I prepared them for burial.
Q. Then what became of them?
A. Some of them were buried here and some shipped away.

Witness excused.

G. L. HORN, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows:

213 Examined by JOHN M. STEWART:

Q. State your name, age, residence, and occupation.
A. G. L. Horn, Jr.; Lincoln, Nebraska; coal business.
Q. Were you acquainted with John R. Matthews, deceased, in his lifetime?
A. I was.
Q. How long did you know him prior to his death?
A. I have known him ever since the summer of 1892.
Q. What was his occupation during the time that you knew him?
A. He was a traveling salesman.
Q. What selling?
A. Coal.
Q. Was he in the employ of the same company that you was?
A. Not when I first got aquainted with him; afterwards he was.
1 Q. Were you acquainted with his habits as to industry and temperance, etc.?

Counsel for defendant objects as incompetent, immaterial, no foundation laid, not an element of damages in this case.

A. I was.
2 Q. What were they?

Counsel for defendant objected as incompetent, immaterial, no foundation laid, not an element of damages in this case.

A. Very exemplary, sober, economical; had no bad habits.

Counsel for defendants moved to strike out the answer of witness as incompetent, immaterial, conclusion of witness, and not a statement of facts and no foundation laid for such testimony.

3 Q. Do you remember the circumstance of the wreck on the
214 Chicago, Rock Island and Pacific railway just south of this city on August 9th, 1894?
A. Yes, sir.
Q. Were you at the scene of the wreck on the day after it happened?
A. I was.
Q. What were you there for?
A. I went down to see if I could find out anything about Matthews.

Q. Did you find out anything there?
A. No; not at the wreck.
Q. Where did you find out anything about it?
4 A. The first man I struck was this militiaman down there at Fairbury—Bills. I hunted him out at the Lincoln hotel, and there was another here—I forget his name—in Hutchins, and Hyatt told them something about it.

Counsel for defendant moves to strike out the last answer of the witness as incompetent and hearsay.

5 Q. Did you see the remains that were brought from the scene of the wreck to the undertaking rooms of Walton G. Roberts?

Counsel for defendant objects as assuming facts not proven, incompetent, immaterial, and no foundation laid.

A. I did.
Q. How long was that after the wreck?
A. I saw them the night after the wreck happened.
Q. Were you acquainted with the kind of clothing worn by John R. Matthews about the time of this wreck or any of his clothes?
A. I remember the kind of suit he had on the last time I saw him before the wreck.
Q. Did you find anything on the remains at the undertaking rooms of Walton G. Roberts that were like any clothing you
215 had seen on Matthews, the deceased, prior to that time?

Counsel for defendant objected as incompetent, immaterial, leading, and suggestive, no foundation laid, not proper subject for comparative or expert testimony.

A. I did.
7 Q. Go ahead and state what it was.

Counsel for defendant made same objection last above.

A. Well, there was a little strip of clothing I took off his body—one piece where it was charred under the arm, I think, was not burned so bad, and looked very much like the suit of clothes that he had on the last time I saw him, and he used to wear suspenders—a piece of suspender taken off that looked to me very much to me like Guyot's suspenders, and he used to wear elastic garters, and there was a part of one of them taken off and that not all burned up; about half.
8 Q. Were you acquainted with Matthews' ability as a traveling salesman and the amount of money he was able to earn?

Counsel for defendant objected as incompetent, immaterial, not proper under the issues in this case, not an element of damages.

A. Why, I was.
9 Q. Now, state as near as you can his ability as a traveling salesman and about what he was capable of earning and was earning, if you know.

Counsel for defendant objected as no proper foundation laid,

incompetent, immaterial, not an issue under the pleadings in this case.

216 10 A. Well, we considered him the best man we had on the road. I don't know what salary he was getting, but from what he told me he had saved up in the course of four or five years something like $2,000 or $3,000 that he applied to paying off some old debts he owed.

11, Counsel for defendant moved to strike out the answer as incompetent, hearsay, and as a conclusion of the witness.

Witness excused.

Certificate.

I, J. E. Ferris, a notary public duly commissioned and qualified within and for the county of Lancaster, in the State of Nebraska, do hereby certify that G. L. Horn, P. H. Mathews, W. G. Roberts, and J. C. Puetz were by me first duty sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them respectively given as above set forth were reduced to writing by myself in the presence of the witnesses respectively, and were taken at the time and place in the annexed notice specified and according to the terms of the stipulation also annexed, which stipulation was made and entered into between the parties in my presence; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit, and said depositions were commenced at the time and place in said notice specified and continued by adjournment from day to day, as above stated.

In testimony whereof I have hereunto set my hand and [SEAL.] caused to be affixed my official seal this 7th day of November, A. D. 1896.

J. E. FERRIS,
Notary Public.

My commission expires April 12th, 1898.

217 *Fees.*

Administering 4 oaths, 10	.40
45 folios, at 20c	9.00
Two certificates, at 25	.50
Postage	.15
	10.05

Depositions of sundry witnesses taken before me, N. J. Lance, a justice of the peace within and for the county of Madison, in the State of North Carolina, on the 2nd day of September, 1896, between the hours of nine o'clock a. m. and six o'clock p. m., at Hot Springs, in said county, at the office of the Mountain Park hotel, in Hot Springs, in said county, pursuant to the annexed notice, to be read in evidence in behalf of the defendant in an action pending in the district court within and for the county of Thayer, State of Nebraska, in which Webster Eaton, administrator of the estate of John R. Matthews, deceased, is plaintiff and The Chicago, Rock Island and Pacific Railway Company is defendant.

The said defendant appearing by J. E. Dolman, its attorney, the plaintiff not appearing, either in person or by attorney.

F. D. CRIM, of lawful age, being by me duly sworn, cautioned, and duly examined as hereinafter certified, deposeth and sayeth as follows:

1 Q. Please state your name, residence, and occupation.

A. F. D. Crim; Hot Springs, N. C.; physician and surgeon.

2 Q. Where did you reside and what was your occupation on or about the 9th of August, 1894?

A. Lived at Lancaster, Nebraska, and was engaged in the practice of medicine and surgery.

3 Q. What official position, if any, did you hold at that time with Lancaster county, State of Nebraska?

A. I was coroner of Lancaster county.

4 Q. Do you remember the circumstance of a wreck occurring south of Lincoln, Nebraska, on the night of August 9th, 1894,
218 on the Rock Island railroad?

A. I remember a wreck five miles southwest of Lincoln, Nebraska.

5 Q. Upon what *wreck* did that wreck occur?

A. Chicago, Rock Island and Pacific.

6 Q. Did you go out to the place where the wreck occurred that night?

A. I did.

7 Q. About what time?

A. I started for the wreck a few minutes after eleven and reached the wreck about twelve or a few minutes afterwards on the night of August 10th, 1894.

8 Q. What caused you to go to the wreck at that time?

A. I saw an injured man being carried into one of the hotels. Inquiring of the patrol driver as to how the injury had occurred, he said a bad wreck had occurred at a trestle of the Rock Island, and that I ought to go there at once. I had my horse hitched up and drove to the wreck as soon as I could.

9 Q. Was that such an occurrence as required your presence as coroner of Lancaster county?

A. It was.

10 Q. After arriving at the bridge where the wreck occurred did you make any examination of the track and ties and of the bridge?
A. I did.
11 Q. Please state what you observed in making that examination.
A. I approached the trestle from the east side. It was then on fire; about 150 or 200 feet off the trestle was a flaming mass. To the northwest side of the trestle lay the ruins of a burned train, the wood-work being at that time entirely consumed, and the irons of the train lay on a flaming bed of coals. I descended on the
219 same side of the trestle, crossed under the trestle, went across the Union Pacific and B. & M. tracks, ascending the dump on the southwest or far end of the trestle. I then walked on the trestle on that side at a distance of four or five ties from the dump. The rail on the southeast side of the trestle was loosened, and set aside about ten inches. The far end of the rail was still attached by angle bars to the next rail. I proceeded along the track to the northeast end of the rail. The foot of the angle bar which held the loose rail to the sound rail had been cut off at the corner attached to the loose rail, as if done by the flange or tread of the wheels. At this point the derailed train had swerved to the north, as shown by the print of the wheels and flanges on the oak ties. I followed the line of the wheels on the ties as far as the heat would allow me, but could not reach the point at which the train had left the trestle. I then returned, exam-ing the northwest rails. There was nothing wrong with these rails until I reached the point opposite the attachment of the loose rail with the sound rail. At this point the wheels on the north side of the track had climbed or jumped over the rail, taking the outside of the rail. Following the rail, the first rail on the bridge from the southwest end, I found one or two spikes removed, and one which the bar had evidently slipped and could not be drawn. That was all I noticed wrong with that rail. I then crossed over to examine the loose rail more carefully. The angle bars holding the end nearest the dump were gone. All loose spikes were gone. On the side where the rail had originally set opposite the spikes were smooth indentations, looking as if they had been recently made by some steel or iron instrument, such as would be made by a
220 bar under great pressure. These indentations were free from dust, shining and distinct. I examined them by the light of the burning bridge and by matches struck for that purpose. I then went on the dump and looked along the line of the rail to see the direction in which the flanges of the wheels first struck the ties of the bridge. They were in line with the position a wheel should occupy on the sound rail approaching the bridge. The end of the loose rail was on or near the fourth bridge tie proper. The first tie that was indented by the flanges was No. 7 of the bridge ties proper. The indentation in this tie was not very deep. The 8th tie was deeply indented, and a spike which had held the inside of the rail was deeply buried in the timber. The line of the flange on the ties ran nearly straight on a line with the rail until the mark reached the junction of the loose rail with the sound rail, at which point the

marks ran diagonally toward the northwest side of the trestle, as before described. I then went back on the dump sixty or eighty feet and examined the dump ties and rails to see if there was any mark of the train being off the track or having any part thereof dragging. There was nothing to show that anything was wrong until the fourth tie proper of the bridge was reached, or the point at which the first south rail of the bridge had been displaced.

12 Q. What was your purpose in making this examination?

A. The purpose of making this examination was to determine in my mind and, if possible, for future investigation the cause of the wreck. It was my official duty to make such examination.

13 Q. When you speak of the loose and sound rails, please describe what you mean—that is, the location of the loose rail or rails and the location of the sound rails.

221 A. By loose rail I mean the first rail on the southwest end of the bridge on the southeast side of the track, or the right-hand rail as you approach the trestle from the southwest. By the sound rail I refer to the next rail from the approach from which the spikes had not been drawn.

14 Q. Are you familiar and do you know the construction and shape of a claw-bar?

A. I do.

15 Q. Were there any indentations in any of the ties opposite any holes where spikes had formerly been which indicated that a claw-bar had been used to draw the spikes?

A. There were indications opposite several spike-holes on the outer side of the south rail similar to those which would be made by those of a claw-bar. There was also a similar indentation opposite the spike on the northwest side which had apparently slipped in the process of drawing the eighth tie.

16 Q. When you speak of the first indentation being upon the 7th tie having the appearance of having been made by a wheel, what tie do you refer to, going east from the west end of the bridge?

A. No. 7, from the southwest end of the bridge, or the third tie from the end of the rail, which projected from the end of the dump onto the trestle.

17 Q. State whether or not this indentation which had the appearance of having been made by a wheel was strictly in line with the rail which remained upon the bridge.

A. It was at the inner side of the line of the rail in the position that the flanges of the wheels would be in in passing straight from the sound rail onto the ties.

222 18 Q. Which rail from the west end of the bridge had the appearance of having been removed?

A. The first right-hand rail on the south as you approach the bridge from the southwest was set about ten inches to the outside and running diagonally to this point, where it was still fastened to the second rail by the angle bars.

19 Q. Were there any angle bars on the sound rail on the right-hand side from the west end of the bridge at the point where the wheel appeared to have left the rail?

A. There were none.

19½ Q. Did you find any bolts which should have connected the angle bars?

A. I did not. I looked for them, but did not find them.

20 Q. Did the holes in the south rail at the point where the wheels had left the rail onto the bridge have the appearance of the bolts having been broken off?

A. I did not see anything which indicated anything having been broken.

21 Q. Was there anything at the end of the rail on the west end of the bridge, where the train had left the rail, to indicate that the wheels of the train had forced the rail from its connection?

A. I did not see any.

22 Q. Please state what appearance the holes which had contained the spikes had at that time.

A. The holes were nearly square, as if the spikes had been drawn and not crowded out.

23 Q. State whether or not they had a fresh or old appearance.

A. They had the appearance of being recently drawn.

223 24 Q. Was the wood around the holes new or old?

A. They were sound, new ties—that is, comparatively new; browned by exposure, but perfectly sound.

25 Q. What sort of ties were in this bridge?

A. The ties were made of oak, sawed square or nearly so.

26 Q. Were they sound or otherwise?

A. I examined as far toward the burnt portion as I could walk. Every one was sound except the one about fifty feet from the end of the bridge, which had one corner slivered off about an inch wide at its widest part. That had been recently broken off by the train spoken of.

27 Q. What was the condition of the wood in that tie?

A. Perfectly sound.

28 Q. How many rails had the appearance of having been removed?

A. Only one.

29 Q. From the examination which you made at that time, please state whether or not the wreck had the appearance of having been made by some agency outside of the ordinary operation of the railroad.

A. It had.

30 Q. Did you afterward make any further examination of this bridge; and, if so, when?

A. I examined the trestle between the hours of nine and ten on the following morning with the jury, which I had summoned for the purpose of examining into the cause of the wreck.

31 Q. Did you observe anything further with reference to the cause of the wreck at that time?

A. I do not think I gained any material points at that time.

32 Q. For the purpose of the coroner's inquest did you re-

224 move any of the ties of the bridge?

A. On the morning of the 10th, about ten o'clock, I had

the sectionmen remove tie No. 8 from the southwest end of the bridge.

33 Q. Did you have that done under your own personal supervision?

A. I did.

34 Q. What was done with that tie?

A. It was placed on a Union Pacific engine and in the custody of Walton G. Roberts.

35 Q. Taken where?

A. Taken to his undertaking rooms, and from there to the courthouse of Lancaster county, where it was kept in the *value* of the county surveyor until produced at the coroner's inquest, and later appeared in the district court.

36 Q. Did you make any mark upon the tie; and, if so, what?

A. Wrote my name on it with a pencil.

37 Q. Were you shown the spikes, nuts, claw-bar, and monkey-wrench which were said to have been found at the place of the wreck?

A. I was.

38 Q. In what condition were the spikes and nuts as to being sound or unsound?

A. They were sound.

39 Q. When did you first see this monkey-wrench?

A. Morning of the second day after the wreck.

40 Q. How was it adjusted with reference to the size of the nuts?

A. I tried it on the nuts and it fitted the nuts exactly.

41 Q. What did you do with the wrench after it came into your possession?

225 A. I kept it in my possession under lock and key and allowed no one to touch the screw until it passed from my possession into the hands of the district court at the time it was given in evidence on the first trial of the case of the State of Nebraska against G. W. Davis.

42 Q. Were you present at the Rock Island depot, in Lincoln, Neb., when Tom Rickle loosened a rail with the same claw-bar and monkey-wrench which were found at the bridge?

A. I was.

43 Q. What was the object in having this trial made?

A. As coroner of Lincoln county I had the trial made to determine whether a rail similar to the one on the bridge fastened with similar spikes to similar ties could be removed with the implements in my possession said to have been found at the place of the wreck and the time required for an unskillful hand to remove the same.

44 Q. In what time was this rail loosened and shoved to one side by Mr. Rickle?

A. As I timed it, twenty-one minutes and some seconds.

45 Q. Did you place the heel of the claw-bar which was said to have been found at the place of the wreck in the indentation opposite the spikes that had been drawn?

A. I placed the bar in position to draw the spike on the tie No. eight, which I removed from the bridge and which showed by the

fresh marks on the head of the spike that a recent unsuccessful attempt to remove the spike had been made, and the heel of the bar fitted the indentation in the tie exactly.

46 Q. Now, did you try a Rock Island claw-bar in the same manner on the same tie?

226 A. I did.

47 Q. With what result?

A. The Rock Island bar had a longer heel of different curve and did not fit the indentation at all.

I, N. J. Nance, a justice of the peace within and for the county of Madison, State of North Carolina, do hereby certify that F. D. Crim was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed, as above set forth, was reduced to writing by W. H. Lamberson, who is not interested in the suit, in my presence and in the presence of the witness, and was subscribed by the said witness in my presence, and was taken at the time and place in the annexed notice specified.

That I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit, and said deposition was commenced at the time in said notice specified, as above stated.

In testimony whereof I have hereunto set my hand and affixed my seal as justice of the peace this 2nd day of September, 1896.

N. J. LANCE,
Justice of the Peace.

STATE OF NORTH CAROLINA, }
Madison County. }

I, M. A. Chandley, clerk of superior court of said county, do certify that N. J. Lance, whose genuine signature appears to the foregoing certificate, is and was at the time of signing the same an acting justice of the peace for said county, and full faith and credit are due to his official acts.

227 Given under my hand and official seal this 2nd day of September, 1896.

[SEAL.] M. A. CHANDLEY,
Clerk of Superior Court, Madison County.

Deposition of witness taken before me, James C. Noell, a notary public within and for the county of Howell, in the State of Missouri, on the sixth day of November, in the year of 1896, between the hours of nine a. m. and six p. m. of said day, at the passenger depot of the Kansas City, Ft. Scott and Memphis Railroad Company, in the town of Willow Springs, in said county, pursuant to the annexed notice, to be read in evidence in behalf of the defendant in an action pending in the district court of Thayer county, State of Nebraska, in which Webster Eaton, administrator of the estate of John R. Matthews, is plaintiff and The Chicago, Rock Island and Pacific Railway Company is defendant.

W. E. Evans appeared for the defendant.

HARRY FOOTE, of lawful age, being by me first duly examined, cautioned, and solemnly sworn as hereinafter certified, deposeth and sayeth as follows:

1 Q. State your name, age, and place of residence.
A. Harry Foote; 25 years; Howell county, Mo.
2 Q. How long have you lived in Howell Co., Mo.?
A. Since the 13th day of last March.
3 Q. Where did you live prior to that time?
A. Horton, Kansas.
4 Q. What is your present business?
A. Farming, and have been since moved here.
5 Q. What was your business while residing at Horton?
A. Railroading.
6 Q. For what company were you working?
228 A. Chicago, Rock Island and Pacific Railway Company, the defendant.
7 Q. How long were you in the employ of the defendant?
A. Seven or eight years.
8 Q. In what capacity were you employed?
A. Brakeman.
9 Q. What were you doing on the 9th day of August, 1894?
A. Braking on passenger train for the defendant.
10 Q. Between what points were you running as brakeman at that time?
A. Council Bluffs, Iowa, and Belleville, Kansas.
11 Q. How long had you been running between those points as a brakeman on passenger train for the defendant?
A. About a year and a half.
12 Q. What was the number of the trains on which you were employed during that time?
A. Seven and eight.
13 Q. What train were you running on, if any, on the evening of August 9th, 1894?
A. No. 8.
14 Q. Which way was your train running?
A. East.

15 Q. What point had you left that evening, and where were you going?

A. Left Belleville, Kansas, for Council Bluffs, Iowa.

16 Q. Did your train meet with any accident that evening? And, if it did, state what it was and the time and place where it occurred.

A. Yes; I met with an accident. The train was derailed about 9.35 p. m., about four miles southwest of Lincoln, Neb., at crossing of the overhead bridge on trestle over the B. & M. railroad and U. P. railroad.

229 17 Q. Do you know about the speed the train was running at the time of the accident?

A. Yes.

18 Q. Please state what the speed was.

A. About 45 miles an hour.

19 Q. About how long had it been running at that speed?

A. We have run that fast or faster ever since the run has been on, something like a year and six months.

20 Q. Please state if that was the usual or unusual speed for that train.

A. It was the usual speed.

21 Q. Where were you at the time the accident occurred?

A. Sitting in rear seat of the rear car.

22 Q. What did the train consist of?

A. Of combination car and first-class coach and engine and tender.

23 Q. Is that the wreck or accident in question in this case?

A. Yes.

24 Q. In what way was the train supplied with brakes and air brakes?

A. Tender and both cars connected with the air.

25 Q. What, if anything, did you do immediately after the wreck occur-ed?

A. I looked after the injured persons until I had all the injured ones taken from the train.

26 Q. Where on the track did this accident occur?

A. On the west end of the trestle over B. & M. railroad and U. P. railroad.

27 Q. After you removed the injured passengers state what you did, if anything, in examining the trestle where the accident occurred.

A. I went up on the trestle and examined it.

230 28 Q. How soon did you make the examination after the accident occurred?

A. About ten minutes.

29 Q. Had any change been made in the trestle or track after the wreck and before you made the examination?

A. No, sir.

30 Q. Please state what you found by the examination.

A. I found a claw-bar, sometimes called a clinch-bar, a pair of pinchers, an angle bar, bolts, and two nuts. The pinchers, angle bar, bolts, and nuts were found under the first joint of west end of

the bridge, and the claw-bar was found on the fill or bank south of the track about twenty feet. The first and second rails on the south side of the bridge and immediately east from the west end of the bridge were turned over to the south or southeast and from six to twelve inches south of the line of the rail west thereof. The second rail on the south was bent out of shape and turned farther around than the one west of it. I also examined spike-holes on the south side of the bridge which had held the south rail at the west end of the bridge in position. The condition of the holes were that the spikes must have been drawn with a claw-bar. The impression of a claw-bar or some hard instrument was on the ties at each of the spike-holes and the holes appeared new, as if the spikes had been out of them only a few minutes. The nuts that I found were under the first joint east of the west end of the trestle and on the south side and within a few inches of the bolts. The threads on the bolts were in good condition, as though the nuts had been removed a few minutes before. I also observed immediately east of the first
231 joint of the west end of the bridge and on the south side marks or indentations made by the flange of the wheels of the engine and cars. These marks on the ties were on the south side and a few inches north of the south rail at the west end of the bridge or trestle.

31 Q. Please state the condition your train was in at the time of and before the accident.

A. In good condition, the cars and engine being in first-class order.

32 Q. About how long you say your train had been running on that run at the rate of speed which you have mentioned?

A. About a year and a half.

33 Q. Please state whether or not during any of that time and before the accident in question an accident of any kind *that* had occurred to your train while running, as you were, at that rate of speed or at any other speed.

A. Nothing while running.

34 Q. State who the persons were you saw first after the accident except those on the train, and how soon after the accident did you see them.

A. I saw a couple of farmers and a colored man, George Washington Davis, coming down off the fill of the west end of the bridge between five and ten minutes after the wreck occurred.

35 Q. Please state the manner in which your train was operated and run on the evening of the accident before and at the time of the accident.

A. The same as it had been ever since I had been on the run, with great care and caution.

36 Q. How was the train manned at the time of the accident?

A. By engineer, fireman, baggageman, brakeman, and conductor.

232 37 Q. How long has it been since you last worked for defendant or was in its employ?

A. About nine months.

HARRY FOOT.

I, James C. Noell, a notary public within and for the county of Howell, in the State of Missouri, do hereby certify that Harry Foote was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed, above set forth, was reduced to writing by Alice Noell, who is not interested in the suit, in my presence and in the presence of the said witness, and was subscribed by said witness in my presence, and was taken at the time and place in the annexed notice specified; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit, and said deposition was commenced at the time in said notice specified and taken and completed on said sixth day of November, 1896.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this sixth day of November, A. D. 1896.

My term expires Febr. 24th, 1899.

[SEAL.] JAMES C. NOELL,
Notary Public.

Notary fees, $2.60, paid by defendant; witness fees, $1.00.

Caption.

Depositions of sundry witnesses taken before J. E. Ferris, a notary public, duly commissioned and qualified, within and for the county of Lancaster and State of Nebraska, on the tenth day of October, in the year A. D. 1896, between the hours of 9 a. m. and 6 p. m., in said county, pursuant to the annexed notice, to be read in
233 evidence in behalf of the plaintiff, in an action pending in the district court of the seventh judicial district of Nebraska in and for Thayer county, in which Webster Eaton, administrator of the estate of John R. Matthews, deceased, is plaintiff and The Chicago, Rock Island and Pacific Railway Company is defendant.

Appearances: John M. Stewart, for plaintiff; Robert J. Greene, for defendant.

STATE OF NEBRASKA, } ss.:
Thayer County, }

In the District Court of Thayer County, State of Nebraska.

BERTHA ZERNECKE, Administratrix of the Estate of Ernest H. Zernecke, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY Company, Defendant. } Depositions.

Depositions of sundry witnesses taken before me, a notary public duly commissioned and qualified for and residing in the county of Lancaster and State of Nebraska, on the 21st day of October, in the year 1896, between the hours of 9 a. m. and 6 p. m., at the office of L. W. Billingsley and R. Green, at 210 So. 11th street, in the city of Lincoln, in said county, pursuant to the annexed notice, to be read in evidence on behalf of the defendants in an action pending in the district court of Thayer county, in which Bertha
234 Zernecke, administratrix of the estate of Ernest H. Zernecke, deceased, is plaintiff and The Chicago, Rock Island and Pacific Railway Company is defendant.

(Notice attached in usual form, the receipt of which is acknowledged on the 19th day of October, 1896, by Stewart and Monger, attorneys for plaintiff.)

LEWIS RYAN, being produced and duly sworn, testified as follows:

Examined by Mr. GREEN:

1 Q. Mr. Ryan, you may state your name, age, and place of residence.

A. Lewis Ryan is my name; age, twenty-one; 812 E street.

2 Q. What relation are you to Frank Ryan?

A. He is my cousin.

3 Q. And you and your cousin respectively are sons of Robert and Thomas Ryan?

A. Thomas and Robert.

4 Q. How long have you lived here?

A. About sixteen years.

5 Q. Where were you on the 8th of August—Wednesday evening, the eighth of August, 1894?

A. I was out walking on the Union Pacific track south of the city.

6 Q. With whom?

A. My cousin Frank.

7 Q. Did you overtake any one on the road?

A. Yes, sir.

8 Q. Where?

A. A little south of the Penn. road, what is known as the Penn. road.

9 Q. And on what road or highway were you?

A. On the Union Pacific track.

10 Q. About how far from the Penn. road was it?

A. It is about two blocks, I should say.

235 11 Q. What were you doing, you and your cousin?

A. Walking.

12 Q. You know where the Rock Island wreck occurred on the night of August 9th, 1894?

A. Yes, sir.

13 Q. About how far from the place where the wreck occurred were you when you overtook this person on the track?

A. It is about between a mile and a half and two miles.

14 Q. How many times did you see the person?

A. Three.

15 Q. Describe the person.

A. He was a colored man; looked something like an office official; tall; weight between 180 and probably 190, and heavy, square shoulders.

16 Q. What sort of a *gate*?

A. Walking very slow and had a shuffling *gate*.

17 Q. What, if anything, did he have with him?

A. When I was going by him, up to him, I supposed he had a gun and game sack in his hand and over his shoulder, and when I got up close to him I saw it was a crowbar.

18 Q. What else?

A. And a sack of some coarse material.

19 Q. Just describe the appearance of the sack he had in his hand.

A. It was what appeared to be a gunny sack rolled up at the mouth; about a foot rolled down at the mouth, and it had an ang-ler object in it.

20 Q. How was he carrying the crowbar?

A. Over his left shoulder; had hold of it with his left hand.

21 Q. How close were you to him at any time?

A. We passed him twice within about three feet.

22 Q. You may state whether or not you are positive as to what he had; and, if so, what it was.

236 A. I know it was either a crowbar or a claw-bar, because I was looking at him closely when we passed him.

23 Q. When did you next see this man?

A. Two or three days after this.

24 Q. And where was that?

A. At the city jail.

25 Q. Did you observe his gait at that time?

A. No; not the first time; no.

26 Q. Did you at any time?

A. Yes, sir.

27 Q. Now, you may state whether or not his gait was similar to the man when you saw him on the Union Pacific track.

A. It was the same gait; slow; it was a lazy, shambling gait.

28 Q. What time in the evening of the 8th of August, 1894, was it when you saw this man?

A. About half past eight.

29 Q. What kind of clothes did he have on?

A. A very dark-colored suit.

30 Q. Did you see the clothes that were exhibited in the case of The State of Nebraska against George Washington Davis, tried in the district court of Lancaster county last fall?

A. Yes, sir; I saw the coat.

31 Q. You may state whether or not the clothes that this man wore when you saw him on the Union Pacific track were similar to that coat that were put in evidence in that case.

A. As near as I can remember, it was the same cut and the same shape of coat.

32 Q. Do you know of a hut or shanty in the weeds down near the U. P. track near that place?

237 A. I do.

33 Q. Where is that?

A. About three or four hundred feet south of the Pen. road, and about a hundred feet to the right of the U. P. track.

Cross-examination by Mr. STEWART:

34 Q. Which Ryan did you say was your father?

A. Thomas.

35 Q. How many times have you testified on this subject of meeting this colored man?

A. Four, I think; this is the fifth.

36 Q. Was it getting any ways dark when you met this colored man?

A. It was sunset, but bright moonlight; it was fairly light.

37 Q. You say you overtook him or met him?

A. Both; overtook him going out.

38 Q. Overtook him going out and met him coming back?

A. Yes, sir.

39 Q. What time was that?

A. About half past eight.

40 Q. Did he have anything in his hands then?

A. Yes, sir.

41 Q. Which way was he going then?
A. Going south.
42 Q. And you were going north?
A. No; we were going south.
43 Q. Oh, you overtook him—passed him?
A. Yes, sir.
44 Q. And how long after that did you meet him again?
A. Probably fifteen minutes or twenty.
45 Q. How far from where you first met him?
238 A. Probably three or four hundred feet; might have been six hundred.
46 Q. Had he been continuing to walk on south during that time?
A. I don't know.
47 Q. Didn't pay any attention to him after you passed him?
A. No.
18 Q. But you turned around and came back north and met him still going south?
A. Yes, sir.
49 Q. Did you speak to him?
A. No.
50 Q. Did he speak to you?
A. No.
51 Q. Did he look at you?
A. Yes, sir.

Redirect by Mr. GREEN:

52 Q. How soon after the wreck occur-ed was it that you made a statement, if you made any, of these facts to the authorities?
A. I made a statement to my father the next morning about eight o'clock, and that morning he made a statement to the authorities.

LOUIS RYAN.

Witness excused.

ERNEST SHELLENBERGER, of lawful age, being first called, cautioned, and solemnly sworn, as hereinafter certified, testified as follows:

Examined in chief by R. J. GREENE:

53 Q. Mr. Shellenberger, please state your name, age, and place of residence.
A. Ernest Alphonzo Shellenberger; age, 22; residence, Lincoln, Nebraska?
239 54 Q. Are you acquainted with George Washington Davis, who was charged and convicted of wrecking the Rock Island train on the night of the 9th of August, 1894?
A. I am.
55 Q. How long have you known him?
A. Known him about three years.

56 Q. Were you acquainted with him before the 9th of August, 1894?
A. I was.
57 Q. You may state whether or not you saw him that night.
A. I saw him on the night of the wreck.
58 Q. Whereabouts?
A. Well, south of the wreck, probably about a half a mile.
59 Q. On what road or highway?
A. The Rock Island railway.
60 Q. On which side of Salt Creek bridge did you meet him?
A. I met him south.
61 Q. South of the Salt Creek bridge?
A. Yes, sir.
62 Q. Who was with you, if any one?
A. Mervin Crawford.
63 Q. Did you have any conversation with George Washington Davis?
A. I did.
64 Q. How was he dressed?
A. Why, he had on a dark pair of pants, I think, with a vest and no coat on.
65 Q. He had no coat on?
A. Had on no coat at all.
66 Q. State whether or not he had a lantern with him.
A. He was carrying a lantern.
240 67 Q. About how long after the wreck occurred was this, if you know?
A. I should judge it was about a half an hour.

Cross-examination.

Examined by Mr. STEWART:

68 Q. Where were you living at that time?
A. I was living at Mr. Preston's, about a mile from the wreck—just seven miles south of here on First street.
69 Q. Working for Mr. Preston?
A. Yes, sir.
70 Q. Still living with him?
A. No, sir.
71 Q. How long had you known Davis before the wreck occurred?
A. Known him for over a year.
72 Q. Where did you get acquainted with him?
A. He worked for my father.
73 Q. Where?
A. Two weeks pitching hay.
74 Q. On your father's farm?
A. Yes, sir.
75 Q. Davis was living down in that vicinity?
A. Yes, sir.
76 Q. What time was it this wreck occurred?
A. Between nine and ten o'clock.

77 Q. Between nine and ten?
A. Yes, sir; I believe so.
78 Q. Well, do you know which it was nearest to—nine or ten?
A. It was nearest to ten.
79 Q. And what time of the night was it you met him—Davis?
A. Well, I think it was about half past ten.
80 Q. It was after the wreck, was it?
A. Yes; it was after the wreck.
81 Q. Was you at the wreck?
241 A. Yes, sir.
82 Q. And was going home from it when you met him?
A. No; I was going to the wreck when I met him.
83 Q. You say you had a talk with him then?
A. Yes, sir.
84 Q. About the wreck?
A. Yes, sir.
85 Q. And then you went on down to the wreck?
A. Yes, sir.
86 Q. Where was he living at this time? Who was he working for?
A. Don't know as he was working for anybody. He had been working for Mr. Lonsdale before.

E. A. SHELLENBERGER.

Witness excused.
Question and answer No. 13 of E. A. Shallenberger was excluded.

FRED FOSTER, being called and duly sworn, as hereinafter certified, testified as follows:

Examined in chief by Mr. GREEN:

87 Q. State your name, age, and place of residence.
A. Fred Foster; Roca, Nebraska; age, twenty-nine.
Q. What was your business, Mr. Foster, on the 9th day of August, 1894?
A. Section hand on the Rock Island railroad.
88 Q. On what section?
A. Rokeby section.
89 Q. What is the extent of that section?
A. Five miles and a half.
90 Q. And from what mile post to what mile post, if you remember?
A. I don't remember. We came within a half a mile of that Rock Island bridge where the wreck occurred.
242 91 Q. It is the section that ends just south of the Rock Island bridge?
A. Yes; I forgot the number of that section.
92 Q. Where were you from six to nine o'clock of that day—in the evening?
A. At half past six we left the house for the swimming hole down to the Lincoln park. We run our car down to the Rock Island bridge and transferred to the Union Pacific and run down to the

swimming hole—run down to the swimming hole and set our car off and went swimming, and then we came out and came up on the car to the Rock Island and transferred back, and I says to the boys, Let's see how soon we can make it to Rokeby, and I pulled out my watch and it was just eight o'clock when we started, and I didn't notice after *that what time it was.*

93 Q. Who was present with you?

A. Joe Richardson, Del Austin, Lon and Bert Cambridge, Bert Foster, and myself.

94 Q. At that time did you go out on the trestle bridge?

A. Yes, sir.

95 Q. You may state whether or not you crossed over the point that is alleged to have been removed and wrecked the Rock Island train.

A. We went at least five or six rails over that point.

96 Q. You may state in what condition the rails and spikes and ties were there over which you went in the evening.

A. They were all right.

97 Q. Were you at the wreck the next day?

A. I was there that night.

98 Q. Did you see the place at which the rail was said to have been removed?

243 A. Yes, sir.

99 Q. You may state whether or not you crossed over that particular place.

A. We crossed that particular place that very night going out over the Union Pacific track.

100 Q. On the night of August 9th, before the wrecking of the train?

A. Yes, sir.

101 Q. And in what condition was the track, rail, and bridge at that time?

A. It was all right.

102 Q. Are you in the employ of the Rock Island road?

A. Not now.

103 Q. How long since you have been?

A. Since the 15th of last September.

Cross-examination.

Examined by Mr. STEWART:

104 Q. What time of night did you get to that wreck?

A. About eleven o'clock, as near as I can remember; either eleven or half past eleven, I forget which.

FRED FOSTER.

Witness excused.

The cross-examination is excluded; said deposition, with the exception of questions to which objections are sustained above and the answers thereto, is admitted and read to the jury.

BERT FOSTER, being called and duly sworn, as hereinafter certified, testified as follows:

Examined in chief by Mr. GREENE:

105 Q. State your name, age, and place of residence.
A. Twenty-one years old; Roca, Nebraska.
244 106 Q. What was your business on the 9th day of August, 1894?
A. Working on the Rock Island.
107 Q. What is your business now?
A. Now?
108 Q. Yes.
A. My business ain't much of anything; working for the stove-ware now.
109 Q. How long since you have been employed by the Rock Island?
A. About four months.
110 Q. Were you present with Fred Foster and the other gentlemen that he testified to on the night of August 9th, 1894?
A. Yes, sir.
112 Q. What time did you get there?
A. To the Rock Island wreck?
113 Q. Yes, sir.
A. Oh, about eleven or half past, as he said.
114 Q. When had you been there before?
A. I don't know just exactly when we was there before.
Q. The same day, I mean.
A. The same day?
115 Q. Yes.
A. Don't know as—we was down there that night swimming.
116 Q. That is what I mean. When were you between the hours of six and nine o'clock on the evening of August 9th, 1894?
A. We was at Rokeby.
117 Q. And where else?
A. No, place—oh, we was swimming between six and nine.
245 118 Q. At six and nine you were at Rokeby?
A. Yes, sir.
119 Q. What time did you leave Rokeby?
A. Well, about half past six, I guess.
120 Q. Where did you go?
A. Down to Lincoln Park swimming hole.
121 Q. And how did you go?
A. On the hand car.
122 Q. How far did you go on the hand car before you changed tracks?
A. I couldn't tell you that.
123 Q. I say before you changed tracks?
A. Well, it was about a mile and a half.
124 Q. To the Rock Island overhead bridge, where it crosses over the U. P. tracks?
A. Yes, sir.

125 Q. Did you look at the track on the first two or three joints on that bridge as you went on it?
A. Yes, sir.
126 Q. In what condition was the track?
A. Good condition.
127 Q. Did you examine the track when you came back from the swimming hole?
A. We didn't examine it, but seen everything was all right.
128 Q. Did you go right over it?
A. Yes, sir.
129 Q. How far north did you go?
A. North?
130 Q. Yes; over the bridge.
A. Went out over the U. P. track.
131 Q. What did you go out over that for?
A. To see the U. P. train go under.
246 132 Q. Then where did you go?
A. To Rokeby.
133 Q. What time did you arrive at Rokeby?
A. About eight o'clock.
134 Q. On your way back to Rokeby did you cross the first two or three joints on that bridge?
A. Yes, sir.
135 Q. In what kind of condition were they when you crossed them?
A. Good condition.
136 Q. Who pushed the hand car out on the bridge?
A. All of us.

Cross-examination by Mr. STEWART:

137 Q. Which way from this bridge is the U. P. track?
A. It runs east and west across the Union Pacific. The U. P. runs under the bridge north and south.
138 Q. How far is Rokeby from this bridge?
A. A mile and a half.
139 Q. What time did you quit work?
A. At six o'clock.
140 Q. And then you went down there and got your supper?
A. Yes, sir.
141 Q. And then went back to the swimming hole?
A. We went to the section-house and got supper and then went to the swimming hole.
142 Q. You boarded at the section-house?
A. Yes, sir.
143 Q. Where were you when you quit work?
A. At the section-house.
144 Q. You mean you got in there at six o'clock?
A. Yes, sir.
145 Q. Then you came up on the Rock Island track and crossed the bridge, you say?

247 A. Up to about the center of the bridge where the Union Pacific runs under.

146 Q. Then what did you do?

A. We transferred there onto the U. P. track and went swimming.

147 Q. How did you get your car down on the U. P. track?

A. Carried it down some of the way and pushed it the rest of the way.

148 Q. Which side of the bridge?

A. The south side of the bridge.

149 Q. Took it down the embankment, did you?

A. Yes, sir.

150 Q. Quite a job taking it down there, wasn't it?

A. Not very—down hill.

151 Q. Easier to take it down than up, was it?

A. Yes; pushed it down and carried it up.

152 Q. Which joint was it that was all right?

A. The joint at the west end of the bridge.

153 Q. Which way does the bridge run there?

A. East and west.

154 Q. Right due east and west?

A. No; not exactly due east and west, we call it east and west.

155 Q. Which end of the bridge you say you took the car off at when you went down to the swimming hole?

A. West end.

156 Q. You wasn't out inspecting the track, was you, on this trip?

A. Not exactly; no.

157 Q. Just noticed it as you went along.

A. Yes; saw it was all right.

158 Q. You say you run clear across the bridge?

A. No.

159 Q. Just about the middle?

248 A. About where the U. P. track is.

160 Q. And then run back up to the west end?

A. After we run out on the bridge we went home.

161 Q. Well, now, when you was going down to the swimming hole did you run past the west end of the bridge or did you stop and take the car off?

A. We stopped right at the west end of the bridge to take it down to the U. P. track.

162 Q. Didn't cross the bridge at all when you went down first?

A. No.

163 Q. And the next time you went to come back you run up to the center?

A. Yes, sir.

164 Q. What did you say you done that for?

A. To see the U. P. train go under.

165 Q. Did it go under while you was there?

A. Yes, sir.

166 Q. Was it dark then?

A. No.

166½ Q. Getting dark?
A. Just about dusk.

BERT FOSTER.

Witness excused.
Said deposition is excluded.

WILLIAM E. PAINTER, being called and duly sworn, as hereinafter certified, testified as follows:

Examined by Mr. GREEN:

167 Q. Mr. Painter, what is your business?
A. I am chief clerk for the superintendent of the Burlington at Lincoln.
168 Q. How long have you been in the railroad business?
A. Since 1875.
169 Q. What are your duties?
249 A. Why, in a general way the supervision of the division, under the instructions of the superintendent.
170 Q. What, if anything, do you have to do in viewing wrecks?
A. In case of a wreck happens it is my duty to see that proper means are taken to put it in shape—see if any people are injured and see the track is put in shape for trains.
171 Q. During the course of your employment have you visited many wrecks?
A. A few; couldn't say how many.
172 Q. Made investigations to find out the cause of the wreck?
A. Yes, sir.
173 Q. Did you visit the scene of the Rock Island wreck?
A. Yes, sir.
174 Q. Why did you go there?
A. I was notified that the trestle was burning in such a manner that it was likely to fall on and endanger our track.
175 Q. What time did you go there?
A. About one o'clock a. m.
176 Q. Did you make an examination of the Rock Island track where the wreck occurred?
A. Yes, sir; a casual one.
177 Q. Determine the cause of the wreck?
A. Yes, sir.
A 167 Q. You may state, Mr. Painter, what you found there. Just describe the conditions as you found them.
A 168 A. I found where some spikes had been pulled from some bridge ties near the west end of the bridge and one pair of fish-plates removed from the south rail. There might have been more than that, but I didn't look beyond that.
250 A 168 Q. Did you make any examination of the rails and ties at that place?
A. Well, you mean where the wreck occurred?
A 169 Q. Yes, sir.
A. Yes; where the marks were, where the engine struck the ties.
A 170 Q. In what condition were those ties as to being sound?

A. Excepting where the spikes were pulled, they were all right.

A 171 Q. And there what was their condition?

A. There was a mark showing wheel marks, but the material was in good condition.

A 172 Q. In what condition was the rails?

A. All right—that is, there was nothing to indicate any imperfection in any way.

A 173 Q. Was there anything to show that the trains had been out of order or the track out of order before reaching the point where the rail was displaced?

A. Not so far as I found.

A 174 Q. What was the condition of the spike-holes you examined at the place where the rail had been displaced?

A. They were clean, indicating that the spikes had been drawn with a bar.

A 175 Q. Can you tell the difference when a spike is drawn with a bar and when it is forced out?

A. Yes, sir; the tie will indicate that.

A 176 Q. In what condition will it be when drawn by a bar?

Mr. STEWART: The defendants objects to this testimony as incompetent, irrelevant, and immaterial and not the best evidence; that the ties themselves would be the best evidence, and for the reason that it is calling for the opinion of the witness.

A 177 Q. In what condition would the spike-hole be in the
251 tie when drawn out by a bar?

Mr. STEWART: The defendants object as incompetent, irrelevant, and immaterial and not the best evidence; the ties themselves would be the best evidence, and for the reason that it is calling for the opinion of the witness.

A. It would simply be a clean hole, showing the spike had been lifted out.

178 Q. In what condition would it be if forced or drawn out?

Mr. STEWART: The defendants object as incompetent, irrelevant, and immaterial—not the best evidence, the ties themselves being the best evidence—and for the reason that it is calling for the opinion of the witness.

A. Ragged; the hole would be ragged.

179 Q. Could you tell from the appearance of those spike-holes whether the spikes had been recently drawn or not?

Mr. STEWART: The plaintiff objects as calling for a conclusion of the witness and not the best evidence.

A. In that case I couldn't, because I didn't observe the holes themselves close enough. There was the mark of the claw-bar on the top.

180 Q. What marks, if any, were there upon the ties at this place other than those you have already described?

A. On two or three ties I noticed a dent similar to the heel of a claw-bar.

181 Q. What would you say would cause that dent?

Mr. STEWART: The plaintiff objects as calling for a conclusion of the witness and not the best evidence.

A. The heel of a claw-bar.

252 182 Q. On which rail had the spikes been drawn that you have testified to?

Mr. STEWART: The plaintiff objects as assuming a fact proven upon which there is no evidence.

A. I think it was the first full rail on the bridge.

183 Q. How far on the bridge did the rail immediately south of it run—that is, south and west?

A. About twelve or fourteen feet, I think.

184 Q. Was the rail in place?

A. The rail that was partly on the dump and partly on the ground?

185 Q. Yes.

A. Yes, sir.

186 Q. Was the next rail north and east of that in place?

A. No, sir; it was shoved over to the south.

186½ Q. What indentations, if any, were in line with this rail and in the place where the rail should have been if the track had been in proper condition at the time you saw it?

A. The top of the ties were dented as if struck by a wheel.

187 Q. Were these indentations—were they in direct line with the rail lying immediately south and west of that?

A. Partly, but started toward the north and east.

188 Q. For how long a distance were they in a direct line?

A. I don't know; didn't observe that carefully.

189 Q. Did you make any examination of the north rail opposite this misplaced rail?

A. Just looked at; looked it over; walked alongside of it.

190 Q. What, if anything, did you see with reference to spikes drawn there?

A. The north rails appeared to be in place. Further down there were marks of wheels dropping off the north rail, but some

253 distance after it had dropped off the south rail.

191 Q. You may state what, in your opinion, was the cause of the wreck.

Mr. STEWART: The plaintiff objects as incompetent, immaterial, and irrelevant, calling for the conclusion of the witness, and not a competent nor proper question for the witness to express a conclusion on.

A. The rails on the south side had been tampered with by fish-plates being removed and the spikes drawn, leaving it in such condition that a train moving over it would crowd the rail out of place and it would become derailed.

192 Q. What is your place of residence, Mr. Painter?

A. Lincoln.

Cross-examined by Mr. STEWART:

193 Q. Were the rails or ties twisted or broken at the place of the wreck?

A. No; there was no broken rails or ties I could see.

194 Q. No twisted rails?

A. Didn't observe any; none on the bridge.

195 Q. Was there any off the bridge?

A. I didn't see any at all.

196 Q. You were there, you say, at one o'clock at night?

A. About one o'clock in the morning.

197 Q. What kind of a night was it—was it moonlight or did you have a lantern?

A. I had a lantern. I remember it was starlight; don't remember whether there was any moon at all.

198 Q. Was the track torn up where the wreck occurred, any part of the bridge?

254 A. The only displacement I noticed was at the rail I have described. Men were working beyond where I examined, sawing off the bridge to save it, and whether the rails were displaced farther down or not I don't know. I didn't examine.

199 Q. And you didn't examine the ties?

A. Only a short distance beyond the first joint.

200 Q. How long were you out there?

A. Well, I was out there about two hours and a half working at our track.

201 Q. How much time did you put in inspecting point where the cars left the track?

A. About ten minutes, perhaps; don't know exactly.

202 Q. Now, if you should be wrong in your conclusion that those fish-plates had been removed and the spikes withdrawn, what would you say was the cause of the wreck?

Mr. GREEN: The defendant objects as incompetent, immaterial, and irrelevant and not proper cross-examination.

A. I don't know how to answer that question.

203 Q. Well, where there is a wreck caused by a derailment what, ordinarily, is the cause?

Mr. GREEN: The defendant objects as incompetent and immaterial and not proper cross-examination.

A. There are a great many causes that will make a derailment and sometimes cause a wreck.

204 Q. Can you name them?

Mr. GREEN: The defendant objects as immaterial and incompetent and not proper cross-examination.

A. A broken wheel, a broken rail, or broken fastening—that is, fish-plate. Derailments have occurred that investigations failed to locate what caused them.

255 205 Q. Very often it is a matter of speculation, is it not?

Mr. GREEN: The defendant objects as incompetent, irrelevant, and immaterial and not proper cross-examination.

A. Hardly very often; sometimes.
206 Q. Sometimes?
A. Yes, sir.
207 Q. Was the spikes out on both sides of the rail that you say was displaced?
A. Yes, sir.
Q. Could the rail be displaced without the spikes being withdrawn to some extent?
A. Not under ordinary circumstances.

Redirect examination by Mr. GREEN:

208 Q. In this particular wreck that you examined was the fish-plates broken?
A. I didn't see the fish-plate. I noticed the absence of it.
209 Q. Was the rail broken?
A. No, sir.
210 Q. Was the wheel broken?
A. I didn't see any.
211 Q. You didn't examine the wheel?
A. No, sir.

W. E. PAINTER.

Witness excused.

The further taking of these depositions was here adjourned until tomorrow, October 22nd, 1896, at 9.30 a. m.

All of said deposition is excluded.

256 OCTOBER 22ND, 1896.

BERT CAMBRIDGE, being called and duly sworn, as hereinafter certified, testified as follows:

Examined by Mr. GREEN:

212 Q. State your name and place of residence.
A. Bert Cambridge; my home is at Valparaiso.
213 Q. Nebraska?
A. Yes, sir.
214 Q. Are you acquainted with Fred Foster and Alonzo Cambridge and Bert Foster?
A. Yes, sir.
215 Q. Did you know them on the 9th of August, 1894?
A. Yes, sir.
216 Q. Were you with them on that day?
A. Yes, sir; I was with them.
217 Q. During what hours of that day were you with them?
A. Half past six—right after supper in the evening.
218 Q From then until when?
A. From six until eight o'clock.
219 Q. Where did you go?

A. Why, we took the hand car and went up swimming by the Rock Island track.

220 Q. Where did you get the hand car?

A. The section boss went with us.

221 Q. I mean at what place did you get it.

A. At Rokeby.

222 Q. What was the section boss' name?

A. George Richardson.

223 Q. Who was in the party?

A. My brother and me and the two Foster boys and another Swede fellow; I don't know his name.

224 Q. And the section foreman?

A. Yes, sir.

257 225 Q. Where did you go?

A. Up the Rock Island track to the overhead bridge.

226 Q. Did you go over the part of the track on the bridge where the wreck occur-ed later that night?

A. Yes, sir.

227 Q. In what condition was it when you crossed it?

A. I don't know; just the same as the rest of the track was; run over it; it was all right.

228 Q. Did the hand car run over it?

A. Yes, sir.

229 Q. What did you do with the hand car?

A. Put the hand car back on the track and run back over the bridge.

230 Q. What time was that?

A. A little before eight—ten or fifteen minutes, I should judge.

231 Q. Where did you go from there?

A. Got on the hand car and run down to Rokeby.

232 Q. And went over this place where the wreck afterwards occurred?

A. Yes, sir.

Cross-examination by Mr. STEWART:

233 Q. Were you working on the section?

A. No, sir; we lived just a half mile from there, me and my brother; we were farming on Mrs. Holmes' place.

234 Q. Did you take the hand car off the Rock Island and put it on the U. P. track?

A. Yes, sir.

235 Q. Which end did you take it off at?

A. At the southwest end.

236 Q. Didn't run across the bridge when you first came down?

A. Not when we first came down; we did when we came

258 back; we run up there while the train went past and under.

BERT CAMBRIDGE.

Witness excused.

All of said deposition is excluded.

Miss LETTIE SIDDELL, being called and duly sworn, as hereinafter certified, testified as follows:

Examined by Mr. GREENE:

237 Q. Miss Siddell, where do you live?
A. About five miles south of Lincoln.
238 Q. Where were you living on the 9th of August, 1894?
A. At the same place.
239 Q. Did you hear of the wreck that occurred on the Rock Island road that night?
A. Yes, sir.
240 Q. Did you go to the wreck?
A. Yes, sir.
241 Q. About what time, if you know?
A. Shortly after nine o'clock; somewhere along there.
242 Q. Had anybody else gone from your house before you to the wreck?
A. Yes, sir; my father and brother and another man.
243 Q. How long had they gone before you went?
A. About ten or fifteen minutes, I guess.
244 Q. How did you go—that is, what direction and what route did you follow?
A. I went southeast until I came to the bridge across Salt creek, and then I went northeast.
245 Q. Then went northeast on the Rock Island track?
A. Yes, sir.
246 Q. How far under the overhead bridge did you go?
A. Just a few steps.
247 Q. Did you see anything the matter with the track or bridge?
259 A. Yes; I noticed the rail out of place.
248 Q. How much out of place?
A. Oh, eight or ten inches, I guess.
249 Q. Was that when you first went there?
A. Yes, sir.
250 Q. Who was with you, if any one?
A. Mrs. Cowden.
251 Q. How long were you there at the scene of the wreck?
A. Oh, half an hour or three-quarters.
252 Q. Then where did you go?
A. They took the people to the train and I went right home.
253 Q. Took the people to what train?
A. B. & M., I think.
254 Q. Were you there when they put the people on the B. & M. train from the wreck?
A. Yes, sir.
255 Q. And then you went right home?
A. Yes, sir.
256 Q. Who went with you?
A. Mrs. Cowden.
257 Q. What did you find on your way home?

A. Found three passes.
258 Q. In whose name were those passes made out?
A. Mr. Cherry.
259 Q. What did you do with those passes?
A. I took them home.
260 Q. Did you meet any one on your way down the track before you found the passes?
A. Yes, sir.
261 Q. Who?
A. Mr. and Mrs. Southwell and Mrs. Southwell's sister.
262 Q. And in what direction were they going?
A. Going toward the wreck.
260 263 Q. Then what did you do with the passes as soon as you got home?
A. As soon as father came I gave them to him.
264 Q. Ever see those passes afterwards?
A. Yes, sir.
265 Q. Where?
A. At the court-house.
266 Q. In Mr. Cherry's possession?
A. Yes, sir.
267 Q. Who was Mr. Cherry?
A. He was the mail agent on the train that was wrecked, I think.

Cross-examination by Mr. STEWART:

268 Q. How far from the wreck did you say you found those passes?
A. At the Salt Creek bridge, about a half a mile from the wreck, I guess; somewhere along there.
269 Q. Did you see Mr. Cherry there that evening?
A. I just seen him and that is all; I seen him when they took him out.
270 Q. What did they do with him?
A. Carried him over to the B. & M. train.

LETTIE SEIDELL.

Witness excused.
All of said deposition was excluded.

ALONZO CAMBRIDGE, being called and duly sworn, as hereinafter certified, testified as follows:

Examined by Mr. GREEN:

271 Q. Mr. Cambridge, where do you live?
A. I live in Valparaiso.
272 Q. Where were you living on the 9th of August, 1894?
A. I was living at Mrs. W. W. Holmes' place, near Rokeby.
261 273 Q. In Lancaster county?
A. Yes, sir.
274 Q. How far from the place where the Rock Island wreck occurred that night?
A. About two miles.

275 Q. Are you acquainted with Fred and Bert Foster?
A. Yes, sir.
276 Q. J. C. Richardson?
A. Yes, sir.
277 Q. And Bert Cambridge?
A. Yes, sir.
278 Q. What relation is Bert Cambridge to you?
A. Brother.
279 Q. Were you in company with those gentlemen on the 9th of August, 1894?
A. Yes, sir.
280 Q. Whereabouts?
A. Up swimming in Lincoln park.
281 Q. What time in the evening?
A. It was seven o'clock when we went up.
282 Q. What time did you get back?
A. About 8.20.
283 Q. Just describe that trip.
A. We were going up swimming that night and went over to the station at Rokeby and got the boys to go up swimming with the hand car, and we got the hand car and run up to this overhead bridge and put the hand car off and went down to the U. P. railroad and went about a mile north and went swimming and came back and put our car on at the bridge and run out over the bridge to let the train go under, and then left for town again.
262 284 Q. Did you cross the rails at the place on that bridge where the wreck afterwards occurred that night?
A. Yes, sir.
285 Q. In what condition was the rails, ties, and bridge?
A. So far as I know, they were all right. The hand car run over them all right.
286 Q. Any difference from the rest of the track?
A. No, sir.

ALONZO CAMBRIDGE.

Witness excused.
All of said deposition is excluded.

ERNEST TYERER, being called and duly sworn, as hereinafter certified, testified as follows:

Examined by Mr. GREENE:

287 Q. Where do you live, Mr. Tyerer?
A. I am living with Mr. Lonsdale about six miles south of town.
288 Q. Where during the summer and fall of 1894?
A. I was working with them about seven miles south of town.
289 Q. Are you acquainted with George Washington Davis, who was tried and convicted of wrecking the Rock Island train on the night of the 9th of August, 1894, about four miles south of the city of Lincoln?
A. Yes, sir.
290 Q. How long had you known him at the time of the wreck?

A. Why, about three months, I should judge—three or four, something like that.

291 Q. Did you see the coat that was an exhibit in the case of the State of Nebraska against George Washington Davis, tried in the fall of 1894, in the district court of Lancaster county?

263 A. Yes, sir.

292 Q. Did you examine that coat?

A. Yes, sir.

293 Q. You know whether or not that was his coat?

A. That was his coat.

294 Q. When had you first seen that coat?

A. Why, it was, I think—I don't know exactly. It was one Sunday I saw it first. He came out there.

295 Q. Just describe the coat.

A. It was a blue double-breasted coat, and had black buttons on with these patent fasteners, these rings.

296 Q. What was the appearance of those rings, if you know?

A. They were for the purpose of changing the buttons on the coat.

297 Q. Did you ever try on that coat?

A. Yes, sir.

298 Q. When was that?

A. That Sunday he was out visiting.

299 Q. How long was that before the wreck?

A. Why, just a short time; don't know exactly just how long.

300 Q. How does the coat fit you?

A. Why, it was too large.

301 Q. How many times have you seen Davis prior to August 9th, 1894?

A. Twice—that is, since he left the farm.

302 Q. Had he been working on the farm with you?

A. Yes, sir.

303 Q. For how long a time?

A. I think he started about the fifteenth of March, if I remember right.

304 Q. How long did he work on the farm?

264 A. About three months.

305 Q. And after he left the farm when did you next see him?

A. I should judge it was about probably a week or a little more before the wreck.

306 Q. Did you have any conversation with him at that time?

A. No; not at that time.

307 Q. When did you next see him?

A. The next time I saw him was the night after the wreck.

308 Q. Did you have conversations with him while at Lonsdale together?

A. Yes, sir.

309 Q. You may state any of those conversations you may remember at the present time.

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial and hearsay.

A. Why, he told me one Sunday there—we was walking across one of the lots—he said he guessed farming didn't agree with him any more, and he guessed the railroad company would have to do something for him.

310 Q. How long was that before the wreck?

A. About two weeks, I guess, as near as I can remember.

ERNEST TYRER.

Witness excused.

All of the said deposition is excluded.

WALTER SIDELL, being called and duly sworn, as hereinafter certified, testified as follows:

Examined by Mr. GREENE:

311 Q. Mr. Sidell, where do you live?

A. I live five miles southwest of the city.

312 Q. Where were you living on the 9th of August, 1894?

A. I lived in the same place I do now.

265 313 Q. Were you acquainted at that time with Mr. George Saxton?

A. Yes, sir.

314 Q. Where did he live with reference to your house?

A. Lived just about a straight mile northeast of that corner, or a mile and a quarter around the road.

315 Q. How far is your house from the place where the wreck occurred on the Rock Island road on the night of the 9th of August, 1894?

A. About half a mile, a little more or less.

316 Q. Were you at the wreck that night?

A. Yes, sir.

317 Q. When did you get there, early or late?

A. I got there—claim to be the first man—that is, myself and boy and a man by the name of Jack Coulture.

318 Q. How were you notified of the wreck?

A. We heard it.

319 Q. Just describe what you heard.

A. We had been threshing that day and just got through and was sitting in the dining-room, and we heard a train coming, and somebody made the remark, "There comes Dumpy." We used to call it "Dumpy" because it only had two coaches on, and we heard it very plain. All at once it made a terrible racket, as if running on something beside rails, and a kind of a thud, and that is the last we heard of it until steam began to occur, and then we went out on the porch.

320 Q. About what time of the night was that?

A. About 9.30, I think.

321 Q. Then what did you do?

A. Why, I looked over in that direction of that bridge and I could

see fire or light under that bridge. I said to the boys, I
266 believe this is a wreck, and somebody says, I guess not, and I says, I am almost sure of it, and we could hear voices also, and I says, Let's go over and see, and my boy says, You hadn't better go, as it might be a "hold-up," and I says, I don't care, and we went over there, three of us, and we walked and run and got there just as soon as we could, and examined the wreck.

322 Q. How did you go?

A. Went afoot.

323 Q. I mean in what direction did you go?

A. We went southeast a little way, about half the way, and then northeast until we struck the railroad.

324 Q. What did you go southeast for?

A. To cross Salt creek.

325 Q. Did you go up to the place where the wreck occurred?

A. Yes, sir; we jumped off the very place, you might say, within, I should say, four or five feet of the rail that was off.

326 Q. Did you notice the rail out of place?

A. I don't remember just exactly whether I did or not in the first place.

327 Q. Just tell what you did afterwards.

A. Well, after we jumped off I saw the wreck and somebody called to us. They heard us and told us for God's sake to come down, that they were wrecked, and we went down to the rear coach where some of the passengers were, and Mr. Foot was standing down at the baggage car and he called us to come and help get a man that was fastened in the wreck, and we went down there and he had a lantern, and I says, Is this all the lantern you got? and he says, Yes; and I says to my boy, "You go home and get a lantern." I asked him if
there was a bucket to put the fire out in the engine. The
267 coals were burning in the grate, and I saw no danger, but I thought the fire ought to be put out because something might catch fire, and he says, "No; there is no bucket," and I have a way of whistling to my neighbor, and I whistled to a man by the name of Van Brewer, on the top of the hill. So I waited a few minutes, and instead of its being Van Brewer coming it was my brother and Mr. Saxon, and so we began to chop to get this man out, and we worked at that. In fact we never noticed the fire any more until it started, and we spent all of the time getting him out, and the fire wasn't any more than eighteen inches from him when we pulled him out. Then we put him on the hill where the rest of the passengers were, near the rear coach. About that time this B. & M. train came along on the B. & M. tracks and stopped, and they came over and we took the passengers over—those that couldn't walk—and put them on that train. Then we came back and went out to the place where it started to run off.

328 Q. Just describe the condition of the bridge and those rails and everything at that time.

A. When I got there Mr. Saxton and Harry Foot, the brakeman, was there. I think that is all that was there when I got there, and we began to examine the track. Well, we found the spikes pulled

on the southeast side of the rail; also seen a few, I think—one or two pulled on the north side, and one or two heads pulled off.

329 Q. On what rail was this?

A. This was on the south rail, as I call it—the southeast rail.

330 Q. And what rail with reference to the southwest end of the bridge?

A. That is where the rail was misplaced.

268 331 Q. The first rail that was on the southwest end of the bridge?

A. Yes, sir.

332 Q. That is the one that was misplaced?

A. Yes, sir.

333 Q. Could you tell whether the spikes had been pulled or forced out?

A. That is what they showed and that is what we all agreed.

334 Q. Just tell what you saw.

A. I seen the spikes were pulled out and I seen the angle bars were gone. The rail, I should judge, was between ten and twelve inches placed over on the outside, and you could see where the flanges of the wheel had struck the ties, and we looked to see whether we could see any marks on the ties of the claw-bar which we found. Finally we began to look around for some tools, and I was with the gang, too, who picked up the bar, but I couldn't exactly tell who it was, but I think it was Mr. Saxton, the young gentleman.

335 Q. Where did he pick it up?

A. Right off the bank, about fifteen feet from the place where the rail was taken off, right over the bank to the south; and we found this bar and brought it up, and also found some other pieces, and we tried this bar in the same marks and it fit exactly, and the impression of the bar made in the ties—the impression was just as fresh as if done recently—and I seen on the other side, on the north side of the rail, a spike or two pulled and one or two of the heads pulled out, with the heads just as rare as could be.

336 Q. Did this north rail remain in place?

A. Yes, sir.

337 Q. Now, the line of indentation made by the flanges of

269 the wheel—was they in direct line with the solid rail to the south of them?

A. I should judge for five or six ties.

338 Q. Then what did they do?

A. Went off towards the left, towards the north.

339 Q. For how long a distance were the rails on the north side of the track in good condition?

A. I think until about the end of the second rail only.

340 Q. Then what did you see there?

A. The rails began, it seems to me, lean over partly, and they pushed them out and shoved them out, and it seemed to run right off the bridge.

341 Q. What other tools, if any, were found while you were there?

A. There was a pair of pinchers, this bar, and I don't remember now of anything else only bolts and washers.

342 Q. That claw-bar you saw there that night—did you see it afterwards?

A. Yes, sir.

343 Q. Where?

A. In the court-room.

344 Q. You know whose it was?

A. No; I don't.

345 Q. You know whether any one identified it or claimed it there?

A. I think it was identified by one man.

346 Q. You know who it was?

A. I think it was Shouse.

347 Q. Did you see Davis there that night, the colored man?

A. I seen a colored man and only one, but whether it was Davis or not I don't know myself.

348 Q. Was your daughter there?

A. Yes, sir.

349 Q. You know anything about Davis being sent for down
270 the Rock Island track to the south?

A. I didn't see him go, but seen him come back on the train.

350 Q. What, if anything, did your daughter find there that night and give to you?

A. Well, after I got home she handed me some passes, one over the B. & M., one over the Rock Island, and one over the U. P.

351 Q. Whose were they?

A. They belonged to C. H. Cherry.

352 Q. What did you do with them?

A. Brought them up to the hotel—the Tremont, I think it is, at the corner of 9th and P streets, I think it is—and he was out at the time and I left them there with the nurse that was nursing Scott, the same nurse that was nursing Cherry. No; it was the Opelt hotel.

353 Q. Did you see those passes afterwards at the trial of the case?

A. Yes, sir.

354 Q. Who had them then?

A. I think Mr. Cherry had them; handed them to the attorneys there. I had them in my hands.

355 Q. Did you find any washers there?

A. Yes, sir; I found a washer.

356 Q. Where did you find it?

A. Right under the joint that was misplaced.

357 Q. Where the fish-plates or angle bar had been taken off?

A. Yes, sir.

358 Q. Did you see the fish-plate or angle bar found?

A. Yes, sir; I did.

359 Q. Did you see a pair of nippers found there?

A. Yes, sir; I found them myself.

271 360 Q. Where did you find them?

A. They laid right under the main ties on the timbers.

361 Q. How soon after the wreck occurred did you get there?
A. I don't think it was much over fifteen minutes.
362 Q. How long did you stay?
A. I stayed from the time I arrived there until two o'clock.
363 Q. When did you next go back to the wreck?
A. Went the next morning about eight o'clock.
364 Q. Were you there when the coat was found?
A. No, sir; I didn't see that.
365 Q. Was you there when the monkey-wrench was found?
A. No, sir.
366 Q. You may state whether or not you saw any spikes there that night.
A. Yes, sir; we found spikes and bolts.
367 Q. What was the appearance of the spikes and bolts?
A. Well, the bolt was unscrewed and fresh as if it was just unscrewed; no rust, only a little at the end, but where the nut seemed to be fastened it was just as bright as could be.
368 Q. How about the spikes?
A. The spikes there, I couldn't say how about the spikes any more than remember whether they looked to be old spikes or just drawn out, but we found spikes just the same right there, examined the spike-holes very closely that night.
369 Q. What was their appearance?
A. Why, the spike-holes seemed to be just the same as a hole naturally would be by a spike being driven in and pulled out.
272 370 Q. Any dust or stain in them?
A. No, no dust; just looked as though naturally drawn out. We fitted some spikes in the same holes.
371 Q. You know what time your daughter went home?
A. No, not exactly; she left shortly; right away after we carried the passengers over.
372 Q. Did you see Ernest Shallenberger there that night?
A. I did.
373 Q. You know who was with him?
A. No, sir.

Cross-examination by Mr. STEWART:

374 Q. How many spikes were pulled out?
A. I don't remember as I could tell you exactly. I should think about eight or ten; somewhere along there; I wouldn't say for certain.
375 Q. How many spikes are there used to spike down a rail?
A. I don't know that exactly. On a bridge, I think, they are spiked to every other tie. Now here is a tie (indicating) and there is a tie (indicating), and this tie is spiked on the inside and that one on the outside, and I think there is something about twenty ties to the rail.
376 Q. That would be about ten spikes?
A. Yes—that is, on each side. There is a spike on every tie—but one spike.

377 Q. And how many spikes you think had been pulled out?
A. As near as I can think, I thought that night about 8 or 9. I noticed but one spike sticking in the tie yet, about the center one on the outside.
378 Q. And how did the rail get away from that spike if it wasn't pulled?
A. I don't know that; I didn't say, but it was bent over.
273 379 Q. That is, the spike was?
A. Yes, sir.
280 Q. How many bent spikes did you see?
A. I believe that was the only one on the rail.
381 Q. Were the others all pulled out?
A. I don't know; wouldn't say that, because I don't know as I remember any more.
382 Q. But that is the only one you remember of seeing in?
A. Yes, sir; and it looked as though it was partly pulled and bent over.
383 Q. Did you find any of the spikes that had been pulled out that was bent?
A. No.
384 Q. Did you look for those?
A. Yes, sir; we looked all over for spikes.
385 Q. Did you find any straight ones?
A. Yes, sir.
386 Q. Whereabouts did you find these?
A. Found them right there beside of the track; the rail was off.
387 Q. Did you look down under the bridge?
A. Yes, sir; I was there myself.
388 Q. Find any spikes there?
A. No, sir; didn't find any there.
389 Q. How many of those holes did you examine?
A. I should suppose that we examined five or six—that is, put the bar in—and how many others we looked at I don't know.
390 Q. I mean the spike-holes.
A. Oh, about the same; examined, you might say, all of them along the rail, but I couldn't say how many spikes we had or anything of that kind.
274 — Q. What kind of wood were those ties?
A. Hard oak wood.
391 Q. Are those ties still on the track?
A. No, sir; they took them off here about two months ago, I guess.
392 Q. Changed and put in others?
A. Yes, sir; they went to work under and built up and made all that bridge the same as new.
393 Q. Did the wreck of the train tear the bridge up any?
A. Why, it didn't appear to tear up much; only just the rails.
394 Q. Knock any of the ties out of place?
A. Not that I noticed.
395 Q. Was the rails knocked out of line on both sides?
A. No, sir; the next rail after that—that is, the next one to the

one that is misplaced—the wheels seemed to run against that and crowd it out like and dished that over a good deal.

396 Q. Out, you mean?

A. Yes; for a little ways.

397 Q. You know how many spikes had been pulled out that way?

A. I didn't know any was pulled out. I looked at that the next day; they was just merely pulled out part ways and bent right over, the next rail was.

398 Q. Did you pick up those fish-bars?

A. I had them in my hand, but didn't pick them up.

399 Q. You didn't see them picked up?

A. No; there was four or five of us there together; Mr. Saxton, my son, and Harry Foot was in the crowd.

400 Q. How many were found there that night?

A. Two of them, I think. When I examined and found it looked as though the bar had slipped off and made a scratch.

275 401 Q. And that was about fifteen feet from the end of the bridge?

A. Yes; to the side down the bank.

402 Q. About fifteen feet from the track?

A. Yes, sir; right down close to the fence.

WALTER SEIDELL.

Witness excused.

All of said deposition is excluded.

WILLIAM WEEMS, being called and duly sworn as hereinafter certified, testified as follows:

Examined by Mr. GREENE:

404 Q. Mr. Weems, where do you live at the present time?

A. City block, Lincoln.

405 Q. Where did you live on the 9th of August, 1894?

A. In the Webster block.

406 Q. That is Judge Holmes' block, on South 11th street?

A. Yes, sir.

407 Q. Did you go to the scene of the Rock Island wreck on that night?

A. Yes, sir.

408 Q. With whom?

A. With a fellow by the name of Raymont.

409 Q. What was Raymond's business?

A. Hack driver.

410 Q. What time did you go?

A. About half past ten or eleven o'clock when we got there.

411 Q. How did you go?

A. On a hack.

412 Q. What time did you get home?

A. We got home a little after one or about one; somewheres along there.

413 Q. Who, if anybody, came back with you?

A. The colored fellow came back with us.

276 414 Q. George Washington Davis?
A. I suppose so.
415 Q. Where did you first see him?
A. Saw him out there at the wreck.
416 Q. Whereabouts was he?
A. The first time I saw him?
417 Q. Yes.
A. At the west end of the bridge-work there, along on the bank.
418 Q. Did you see him several times while you were there?
A. Yes, sir.
418½ Q. When, if at all, did you have any conversation with him?
A. I had a conversation with him coming home in the hack.
419 Q. How did it happen he came home with you in the hack?
A. He was coming along with a lantern, and I got to talking to him while he was walking up to the hack, and I asked him how he was coming in, and he said he was going to walk, and we told him we had a hack there and asked him if he would ride, and he said "yes," and got in.
420 Q. How was the window in the hack between the seat and the hack?
A. It was out.
421 Q. Now, just state what conversation you had with him coming in.

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial and as hearsay.

A. Well, about the first conversation I had with him was with regard to the lantern. The first thing, I asked him for his lantern to help us get out of the cornfield there, and we got to talking about the lantern and then I found out—I think the first way it
277 started, I asked him if that was a railroad lantern, and he said it was, I think, yes, and he was on the train during the wreck, when the wreck happened; and then I told him I didn't think it was a railroad lantern, and he said, yes, it was, and then we wanted to know why it didn't break out when the train went off the trestle.
422 Q. How did he say?
A. He said he was sitting in the seat with the brakeman and held the lantern in his hand some way when the train went off and it didn't break, and that is the first I knew about his being in the wreck, and I asked him where he had been, and he said he had been out to Kearney selling some horses for Maxey Cobb, and I called his attention to the fact that he couldn't come from Kearney on the Rock Island, and first he said he could, and then he said he walked to some town out there somewhere and got on, and he also said about having $200 of Maxey Cobb's money in his coat pocket, and during the wreck he took his coat off and hung it on the steps of the coach and it burned up, money and all.
423 Q. What kind of a conversation did you have with him about their not allowing colored men to ride in the rear coach?

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial and hearsay.

A. I spoke to him about it and said I didn't think they allowed colored men to ride in it, and he said they did, and I have forgot just what he did say.

424 Q. Did he tell you how the train did when it was wrecked? How it went from the ties, or anthing?

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial and as hearsay.

278 A. I don't remember whether he did or not.

425 Q. What did he say his name was?

Mr. STEWART: The plaintiff objects as incompetent, immaterial, and irrelevant and as hearsay.

A. Said his name was Washington Davis. I don't remember whether he told me his name that night or not.

426 Q. How far in town did he come with you?

A. He came down here to L street—L and 11th.

427 Q. Did you direct him any place after you got to town?

A. No; I think not. He knew where he was going. We stopped there and watered the horses and he got out.

428 Q. When did you next see him after that?

A. The next time in the court-house.

429 Q. After he was arrested?

A. Yes, sir.

430 Q. What did he pay you, if anything, in money?

A. He gave the hackman one dollar.

431 Q. Did he have on any coat?

A. No; I think not.

432 Q. What kind of a walk did he have?

A. Had kind of a swinging walk; leaned forward considerably when he walked.

433 Q. What kind of pants and vest did he wear that night?

A. Had on dark blue pants and vest.

434 Q. What kind of a shirt?

A. Kind of a light shirt—kind of a pale blue.

No cross-examination.

WM. WEEMS.

Witness excused.

All of said deposition is excluded.

279 WILLIAM LONSDALE, being called and duly sworn as hereinafter certified, testified as follows;

Examined by Mr. GREENE:

435 Q. Mr. Lonsdale, where do you live?

A. Why, I live south of the penaitentary now; I used to live on the Marquette farm.

436 Q. Where were you living on the 9th of August, 1894?

A. Five miles south, on 27th street, on the Marquette farm.

437 Q. Were you acquainted at that time with George Washington Davis?

A. I was.

438 Q. How long had you known him?

A. Oh, about two or three months—two months, I guess.

439 Q. How lately before the wreck had he been there at your place?

A. Why, he had been there—let me see—I think it was the Sunday before the wreck. I am not sure, but I think it was.

440 Q. How was he dressed at that time?

A. He had a blue suit on.

441 Q. New or an old suit?

A. New.

442 Q. Anything unusual or peculiar about the suit?

A. I didn't see anything.

443 Q. What kind of buttons did he have on?

A. Had on dark buttons and fastened with rings on the inside.

444 Q. You know what he had in his pockets at that time? Anything he had in his pocket?

A. Yes, sir; he had a pipe and a picture in his coat pocket.

445 Q. Do you know anything about a looking-glass?

A. Yes, sir; he had a looking-glass—round looking-glass.

280 446 Q. Did you ever see the pipe and looking-glass and pictures again?

A. Yes, sir.

447 Q. Where?

A In the court-room.

448 Q. Where were they taken from at the time you saw them in the court-room?

A. From the pocket of his coat.

449 Q. That was the coat that was identified as found at the wreck?

A. Yes, sir.

450 Q. Did you see any of the boys try the coat on that time?

A. Yes, sir.

451 Q. Who?

A. Young man that worked for us by the name of Ernest Tyrer.

452 Q. How did it fit him?

A. It was too large for him.

453 Q. What, if anything, did he say at that time about the rings and the buttons on his coat?

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial and as hearsay.

A. He said he had brass buttons put on and he would take them off; that he was expecting to use them after a bit.

454 Q. When was he going to put the brass buttons on?

Mr. STEWART: The plaintiff objects as incompetent, immaterial, and irrelevant and as hearsay.

A. Why, he didn't say.
455 Q. Did he ever work for you?
A. Yes, sir.
456 Q. For how long a time?
A. He worked for about two months, I guess.
281 457 Q. What sort — walk or gate did he have?
A. Why, as if lame, as if his feet were sore; sort of shambling walk; didn't walk as if he was all right.

WILLIAM LONSDALE.

Witness excused.
All of said deposition is excluded.

FRED LONSDALE, being called and duly sworn, as hereinafter certified, testified as follows:

Examined by Mr. GREENE:

458 Q. Mr. Lonsdale, where do you live?
A. Six miles south.
459 Q. What is your business?
A. Farming.
460 Q. Where did you live on the 9th of August, 1894, and for several months prior thereto?
A. Six miles south on the farm known as the Marquette farm.
461 Q. Ernest Tyrer lived there with you, too?
A. Yes, sir.
462 Q. And your brother William?
A. Yes, sir.
463 Q. Were you acquainted with George Washington Davis?
A. Yes, sir.
464 Q. Were you present at the time he was arrested?
A. Yes, sir.
465 Q. When had you last seen him before the wreck?
A. Sunday evening before the wreck.
466 Q. Was that the evening he came with the new coat on?
A. No, sir.
467 Q. When did he come with the new coat?
A. Either Wednesday or Thursday before.
468 Q. What did he have to say at that time about the coat?
A. I made the remark to him about his being so well dressed
282 and everything when he was out of work, and he came around close to where I was sitting, and I took hold of it and felt it, and I made a remark, and I turned the coat over and there was rings on the buttons, and I asked the reason of that and he said it was to put brass buttons on when he got a job on the train.
469 Q. Who was present at that time?
A. William Lonsdale, Ernest Tyrer, and, I believe, Jess Enslow.
470 Q. How about Ed. Craighead?
A. He was there, too.
471 Q. After the wreck when did you next see Davis?
A. The next evening.
472 Q. About what time?

A. I think, about seven o'clock.

473 Q. Where?

A. At our place, the Marquette farm.

474 Q. Just describe what he did and said when you saw him there.

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial.

A. Why, I knew he was coming before he got there. I was out to the blacksmith shed. We have a gate there to go into the barn yard, and he came up to me and we passed the time of day, and I said it was hot, and he said it wasn't as hot as it was down to the wreck last night, or something like that.

475 Q. Well, what next?

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial.

A. Then he spoke. I asked him, Was you at the wreck? or something like that, and he said, Yes. He said he had got on the
283 train at Rokeby and was sitting in the hind seat with Harry Foot—don't know whether he said Harry Foot or not, but the brakeman—and he threw his head out of the window and seen the engineer and fireman throw their arms around each other and went over.

476 Q. What did he say, if anything, about in what way the wreck was caused?

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial.

A. We walked on across the corral, and Mr. Enslow just came then with his wagon, and we commenced talking about the wreck, and he said that the bolts had been taken off some way and a part unscrewed under the rail, and he took his hands and showed like this (indicating), and showed how a bar was put under the rail and pryed over, and then we went from there up to the porch of the house and sat there and was there talking about the wreck. He talked about the engineers getting too damned smart and wouldn't stop; that they were afraid of a hold-up.

477 Q. Did he have on any coat?

A. No, sir.

478 Q. What, if anything, did he say about his coat?

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial.

A. When he was leaving the place my brother asked him where his coat was, and he said, "I left it in town."

479 Q. What, if anything, did he say he done with the lantern?

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial.

A. I don't remember anything about the lantern now.

284 480 Q. Did he tell you anything else about the manner in which he found out about the wreck?

A. I heard him tell Jim Malone that he was in the Colored Club room or on the steps of the Colored Club room and heard the crash and went out.

481 Q. How did you know he was coming that night to your place?

A. My brother, William Lonsdale, and Ernest Tyrer had drove about forty rods from the house, and they seen him coming, and they drove back and told me he was coming.

482 Q. When did you first hear of the wreck?

A. About two o'clock in the morning—the same evening of the wreck.

483 Q. Who told you about it?

A. Saxton.

484 Q. George Saxton?

A. Yes, sir; and his son.

485 Q. What sort of a *gate* or walk did Davis have?

A. Sort of rolled when he walked.

486 Q. How was he dressed when he came to your place the night after the wreck?

A. He had blue pants and blue vest and some kind of a colored shirt on and, I believe, a brown soft hat.

FRED LONSDALE.

Witness excused.

The further taking of these depositions was here adjourned until October 23, 1896.

All of said deposition is excluded.

LINCOLN, NEBRASKA, *Oct. 23rd*, 1896.

O. B. RAMEY, being first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, to wit:

Examined by R. J. GREENE, on behalf of the defendant:

285 487 Q. What is your business?

A. Agent for the Pacific and United States Express Co.

488 Q. And what was your business on the 9th and 10th of August, 1894?

A. Same.

489 Q. And what was and is your place of residence?

A. City of Lincoln, Nebraska.

490 Q. You may state whether or not you visited the scene of the Rock Island wreck on the 9th of August, 1894.

A. I did.

491 Q. Who went with you?

A. Mr. W. G. Roberts and Dr. Crim.

492 Q. Did you make an examination of the bridge, the track, and the ties and rails and fastenings at the place where the wreck occurred?

A. Yes, sir; we went out on the top of the bridge with that intention.

493 Q. You may state what you saw in your examination.

A. Well, at the south end of the bridge, as if coming onto the trestle-work at the south rail showed that it had been removed, and that the wheels of the locomotive run squarely off the end of the rail, striking the ties in a direct line from the end of the rail, showing that the rail must have been moved from there when the wheels reached that point.

Mr. Stewart objects on behalf of the plaintiff to the statement as to saying it must have been done for the reason that it is but a conclusion of the witness and isn't a statement of any fact, and moves to strike out the answer of the witness for that reason.

494 Q. With reference to the southwest end of the bridge of trestle-work, what rail is it that you speak of as being removed?

286 A. The south rail coming onto the bridge from the southwest and track running towards the northeast, it would be the south rail or the one on your right.

495 Q. The rail that *lied* immediately south of this, how far did it run onto the bridge, if you remember?

A. To the fourth tie.

496 Q. What, if anything, did you observe as to the spikes on the south side of this rail that was misplaced?

A. They had been drawn. The imprints of a claw-bar was right behind the hole in the tie where the spikes had been drawn straight out of the ties, not bent over by force or anything of that kind.

497 Q. Now, these spike-holes that you testified to, what was their condition—that is, as to being fresh or rusty?

A. We particularly noticed that they were fresh.

498 Q. Did you examine any of the spikes at that place?

A. No; the spikes had been scattered around there. There were none of the spikes around there, I think, on the south side at the time we were there.

499 Q. State whether or not you found any angle bar at the joint formed by this misplaced rail and the one next south of it.

A. No; none there, but some on the trestle-work, but none at the place where the rails had been disconnected.

500 Q. The rail that was south of the misplaced rail was unfastened and apart from the rail you designate as the misplaced rail?

501 A. Yes, sir.

502 Q. In what condition were they?

A. Commencing, I think, on the sixth tie, there was a spike pulled, and on the seventh. On the eight- tie there was a spike re-

287 maining in the tie, but it had been stripped. It was still fresh. The claw-bar had scraped off the head of it, but had not removed the spike. It still remained there.

503 Q. In what condition were the other spikes on the north side of this rail—that is, did they stand up above the ties or were they down in the tie?

A. No; they were drawn out on the north side until you got up pretty close to the end of the rail, and then they were tipped over.

504 Q. Did you make any examination of the north rail?

A. This was the north rail I was speaking of.

505 Q. What was the condition of the spikes on the north side of this south rail which you designate as the misplaced rail?

A. Well, those spikes were gone down close to the end of the rail, but there was a bolt coming from the 6th tie, fastening the tie to the frame of the bridge, where the flange of the engine had hit squarely on top, sinking the top into the wood and just leaving a mark, and passed on to the next tie and struck that with full force on the next tie, making a mark from the rail right straight forward where the rail should be left.

506 Q. Now, with reference to the marks you have testified to appearing to have been made by the flanges of the wheels immediately in the place where the misplaced rail should have been, you may state whether or not they were in a direct line with the rail in place lying immediately south.

A. They were.

507 Q. Did you make any examination of the companion rail to this rail on the north?

A. Yes, sir; and I said the spikes were removed, com-
288 mencing at the 6th tie on the north side of that rail; then coming up to the eighth tie the spike still remained in it, showing it had been clinched with a claw-bar and just stripped at the side of the head.

508 Q. State whether or not this north rail was still in place and in line with the other rails on the bridge.

A. It was still in place, but hardly in line; it had been pressed out, the spikes being removed from the north side.

509 Q. Was it pressed out of line at the north or south end of the rail?

A. At the north end of the rail.

510 Q. How long were those rails, if you know?

A. About twenty-eight feet, I guess.

511 Q. You have already described the condition of things with reference to the misplaced rail and its companion rail on the north. What was the condition of the track from that point on toward the north?

A. You mean in regard to the south or north side?

512 Q. Take both sides; the south side first.

A. On the south side the wheel came in contact with the misplaced rail and crowded hard against it until it pushed it over, and the wheel passed over the corner of that rail right at the joint with it and the rail further north, and they were in a sort of a "V" shape where it crossed over the end, and from that point the marks bore off towards the north. It seemed to have changed the course of the engine by running off the ends of these rails.

513 Q. Do you remember on what tie this spike was you testified it was stripped?

A. The 8th tie.

289 514 Q. Did you ever see that tie again afterwards?
A. Yes, sir; I did.
515 Q. Whereabouts?
A. At the coroner's inquest.
516 Q. And did you identify that as the tie and spike?
A. Yes, sir.

Cross-examination.

Examined by Mr. STEWART:

517 Q. How many spikes had there been on each side of this iron misplaced rail?
A. I didn't make any examination or count of that; I couldn't tell you.
518 Q. How many had been drawn?
A. On which rail?
519 Q. On the iron misplaced rail.
A. I couldn't tell you the number, but they were all withdrawn on the south side of this rail.
520 Q. All of them?
A. To within, I should think, two or three of the end of the rail.
521 Q. Two or three ties of the end of the rail?
A. Yes, sir.
522 Q. And how many on the north side of the rail?
A. I couldn't say how many on the north side of the rail.
523 Q. About how many were remaining?
A. I didn't make any memorandum of that.
524 Q. Did you make a memorandum of how many were taken out on the north side?
A. No, sir.
525 Q. Was there any taken out?
A. Yes; the one back next to the rail that remained in position were taken out.
526 Q. Would you say half were taken out?
290 A. I wouldn't say, but there was some taken out on the north side of the rail.
527 Q. Can you give any idea of how many?
A. I might make a guess.
528 Q. I don't want you to guess, I want to know if you know anything about it.
A. I don't know anything for sure.
529 Q. You didn't see those spikes pulled out?
A. No, sir.
530 Q. Don't know who pulled them out?
A. No, sir.
531 Q. Nor when they were pulled out?
A. No, sir.
532 Q. You simply saw the holes where apparently had been spikes?
A. Yes; there had been spikes there.

533 Q. And how many spikes had been pulled from the north rail?

A. I think the spikes were pulled up to the—possibly as far as the 16th or 17th tie from the end of the bridge, not counting from the end of the rail that remained intact, but from the end of the bridge.

534 Q. How many ties from the rail that remained intact to the south end of the bridge?

A. There were four.

535 Q. Then the spikes had been pulled out from about how many ties along the north rail?

A. The north rail, commencing at the 6th. The rail didn't end even on the ties. The rail on the south side stopped on the 4th tie, but the one on the north side stopped possibly on the 5th tie.

— Q. Then the spikes had been drawn from ten or a dozen ties north of that yet?

291 A. Yes, sir.

536 Q. Any removed on the inside of that rail?

A. No, sir.

537 Q. Were any of them pulled out by the misplacement of the track?

A. Yes; farther up towards the north end of the rail, the rail had been moved to the north and mashed over the spikes, and sunk down into the wood.

538 Q. That rail had been pressed out, had it?

A. Yes, sir.

539 Q. And which way had the south rail been pressed?

A. It didn't appear to have been pressed at all.

540 Q. Was it right in place?

A. No; it wasn't there at all when the engine wheel came to the end of the rail.

541 Q. Of course, you wasn't there and you don't know that?

A. Oh, no; I wasn't there. The rail was lying, when I seen it, about six inches out at the last tie at the southwest end.

542 Q. And how much out of line at the north end?

A. Well, it ran across the end. It doubled together where the engine run over the corner of it. It lay in, if anything, perhaps a couple or three inches, just as if the two had come together and doubled together.

543 Q. How many spikes you say on the north end of that south rail were left?

A. I didn't say; I didn't make any memorandum of that.

544 Q. Didn't you consider that a matter of some importance?

A. No; I was thoroughly convinced those spikes had been drawn.

545 Q. And you simply thought it was only important to see what spikes were out?

A. I thought it important to see if that rail had been

292 misplaced or taken away from there.

546 Q. Were those spikes that hadn't been drawn on this south rail, any of them, pulled partially out?

A. I didn't notice that they were on the south rail.

547 Q. Did you notice that they were any?

A. No; I didn't examine that. The spike-holes that we examined on the south rail were simply the holes. The spikes wasn't there.

548 Q. You didn't think it was a matter of importance to see whether the spikes were twisted or pulled out?

A. I would have noticed it if there were.

549 Q. You didn't notice whether any of the spikes were partly out?

A. The spikes were up close to the end of the rail, and were removed far enough so the rail could be lifted right out.

550 Q. How do you know, if you don't know how many spikes were left?

A. The rail was left that way.

551 Q. But you don't know whether the spikes on the north end had been lifted or not.

A. They were not there at the time.

552 Q. At the time you saw it?

A. Yes. They wasn't there when the engine left, because she left her marks.

553 Q. You wasn't there, was you?

A. No; but that left an impression afterwards.

554 Q. Which car of that wrecked train left the track first?

A. The engine left the track first.

555 Q. How do you know?

A. Why, the engine runs ahead of the cars, and it was going north.

293 556 Q. But what I want to know is if there was anything there to indicate what wheel of what car first struck the ties?

A. The marks on the south side were all in one line. The engine marks were, of course, the deepest, or rather the others followed right in it on the south side, and there was every indication that showed simply that the engine struck the ties first and the others followed right along.

557 Q. Now, the marks from the engine wheels, you couldn't distinguish those from the impression of the wheels of the other cars?

A. Yes; they would make a deeper imprint in the wood.

558 Q. All made in the same place, were they not?

A. Followed right along on the south side in a line as near as you could draw it.

559 Q. Could you tell from looking at those marks that it hadn't been simply the wheels of the two rear coaches that made the imprints or whether every wheel struck there?

A. Yes; every wheel struck there.

560 Q. How could you tell that?

A. On the north side, where the coaches got off later, you could see they didn't follow right in line. The rail crowded out there and didn't let the engine in onto the ties as soon as the coach wheels struck it.

561 Q. As a matter of fact, the indications are that the engine didn't strike the rail until after the coaches struck it?

A. On the north side, but on the south side they did.

562 Q. Let us suppose that the engine didn't leave these rails until after *they* got past this misplaced rail, and then it and
294 the coach both slid off at the same time and run on straight over, what different marks would it make?

A. Well, then, the marks at the end of the rail on the south side would have resembled the marks where the coaches first struck on the north side, but they didn't do that at all. They were deeply imprinted right from the start on the south side.

563 Q. Now, if all the wheels on the two coaches had struck these ties right at the end of the rail which was not misplaced wouldn't that make a deep imprint?

A. It might, but not so deep as the engine.

564 Q. Why not? Did you ever see a wreck before?

A. Yes, sir; because the engine has much more weight to it and the flange on an engine wheel is made much more sharp.

565 Q. In other words, you arrive at the conclusion that the engine went off of the end of this rail that you speak of simply because you think the cars couldn't have made as deep an imprint in the ties as was found there?

A. Yes; I think she went off the end of the rail and the coaches left after.

566 Q. For the reason, as I understand you, that the imprint in the ties was deeper than the wheels of the coaches would have made?

A. Yes, sir; that is one of the reasons.

567 Q. Have you any other reason?

A. Yes; that everything showed that there was no rail to run on and the engine hunts the ties immediately when there is no rail to run on.

568 Q. But the coach will hunt the tie also when there is nothing to run on?

295 A. Yes, sir; but the engine runs ahead and it strikes it first. If that had been the condition the marks would not have been in line with the track south of the bridge. The rail would have moved with the engine out of line, whichever way the rail gave. The engine would have stayed on the rail until upset and then would have gone on the ties right where it upset.

569 Q. So, then, if the engine had been tipped over by the wheels of the tender, then the wheels of the coaches would have jumped right off the end of the rail which wasn't misplaced and made marks in a direct line as you indicated?

A. No; they would if they had followed the engine; it might not go directly, but would bear off from the track.

570 Q. Haven't you already testified that they did bear off?

A. No, sir; not until after the engine came to the end of that rail where it run over the end of the joint and the cars and the whole thing started north.

571 Q. Do you say the engine run over the misplaced rail?

A. Yes; from the end of it; it had every indication of it—from the north end of it.

572 Q. That is, the engine wheels or the wheels of some car dropped inside of that south rail, did they?

—. ——.

573 Q. They run right where the rail had been that would be inside?

A. Inside of where it was lying or should have been.

574 Q. That is, the rail was pressed out to the side?

A. No; it wasn't pressed out.

575 Q. Well, it was out to the south?

A. Yes, sir.

576 Q. And the wheels of some car of that train made marks right where the rails should have been left?

A. Yes, sir.

296 Redirect.

Examined by Mr. R. J. GREENE on behalf of defendant:

577 Q. A railway track is of a fixed gauge, is it not—the rails always the same distance apart?

A. Yes, sir.

578 Q. Now, in answer to Mr. Stewart's question you testified that you knew the engine had passed off immediately on to the ties at the place where the misplaced rail should have been if the track had been in good condition at the time the train passed over it, and you could tell that from the indentations there from the flanges of the engine wheels. Now, state what is the distinction between the indentations made from the flange of the engine wheel and the indentation made from the flange of an ordinary car wheel.

Mr. Stewart, on behalf of the plaintiff, objects to the question as having been already answered and not proper redirect examination.

A. The indentation was heavier or deeper from an engine wheel than it was from a car wheel.

579 Q. Now, if, as stated by Mr. Stewart in his examination, the rail at the place of the misplaced rail had been in place when the engine passed over it, but had crowded out and the wheels of the cars had fallen on the ties, you may state whether or not there would have been any indentations at that point at all of the engine wheels.

A. There would not, and it would be in a direct line if she had given away.

580 Q. Now, you have testified that the rails are the same distance apart on a railway track. If a rail on the south side had been crowded out and had allowed the wheels of the coaches to

297 fall on the ties, you may state whether or not the wheels on the north rail would have also left the rail at the place they did on the south side.

Mr. Stewart, on behalf of the plaintiff, objects as incompetent, immaterial, irrelevant and as not proper redirect examination.

A. They would if they had been crowded off so as to leave the line. They would go off that way altogether.

581 Q. At the same time?

A. Yes, sir.

Recross-examination.

Examined by Mr. STEWART on behalf of plaintiff:

581½ Q. That is, you mean that it would be a physical impossibility for the rail to slip out from under the wheel and let the wheel drop down directly?

A. That is what it would be—an utter impossibility with the engine on the track.

582 Q. If an engine were off the track would it be? Suppose the engine was on ahead on another rail?

A. Well, if it slipped over with the cars——

583 Q. Suppose the rail had slipped inside of the car?

A. The wheels would follow the rail if they were on that rail when it slipped.

584 Q. Would it be impossible for the rail to simply slide out from under the wheels instead of the cars moving off from the rail?

A. No.

585 Q. Think it would not?

A. With the weight on it it would just separate, and it would be so heavy that it would stick to it.

586 Q. At what point did you say that the first marks were found on the ties on the north side?

298 A. Well, it was not found until three or four ties further down. I didn't make a memorandum of that, but it didn't leave the north rail for perhaps four or five ties as soon as it did on the south.

587 Q. Can you state where the first indentation of any wheel was found on the north side?

A. No, sir; I wouldn't state that; I didn't make a memorandum of that.

588 Q. You didn't make any examination of that?

A. Yes; we noticed that, but it didn't leave at the same time.

589 Q. But how much of a difference you are not prepared to say?

A. No, sir.

590 Q. Did you make a memorandum of these appearances and circumstances?

A. I did at the time.

591 Q. And those things you made no memorandum of you can't recall at this time?

A. No; not to be definite; no.

592 Q. Now, your testimony you have given here this afternoon is in accordance with the memorandum you made at that time?

A. I think it is.

593 Q. And it is from that memorandum you are giving your testimony?

A. Well, I turned the diagram in on one former occasion with my evidence, but these facts I made a memorandum of I went afterwards, and they are clear in my mind just as they were then.

594 Q. You know what the reason is you didn't make a memorandum as to where the ties showed the wheels first struck
298½ the ties on the north side?

A It was evidence to me; it didn't seem necessary.

595 Q. And so you didn't make it?

A. I simply noticed it left the north track after it did on the south track.

596 Q. Your impression is now it was how far?

A. I shouldn't say not until four ties further up the track than where the other wheels left.

597 Q. When was it you made this examination—how long after the wreck?

A. Well, it was in the forenoon.

598 Q. Of the day following?

599 A. Yes, sir.

Redirect examination.

Examined by R. J. GREENE in behalf of the plaintiff:

600 Q. The facts you testify to are facts you ascertained at that time?

A. Yes, sir.

601 Q. You have testified to these matters before?

A. Yes, sir.

602 Q. You made a written report of the conditions you found at the wreck, and as to your opinion as to the cause of the wreck, to the companies for which you were working at that time, did you not?

A. I didn't make the written statement to the company. I made the mem*m*orandum—took a pencil and made a little diagram of of this—the condition I found on the ties and the way the rails were misplaced—and made a mem*m*orandum as to which tie the rail was removed from, etc., and that is what I made my evidence from.

603 Q. Now, that diagram you testified to was put in evidence in the Davis case?

299 A. Yes, sir.

604 Q. And you haven't that diagram with you?

A. No, sir.

Redirect examination.

Examined by Mr. STEWART on behalf of the plaintiff:

605 Q. Are you still working for the company?

A. No, sir.

Redirect.

Examined by Mr. R. J. GREENE:

606 Q. What is your business?
A. Agent for the Pacific and United States Express Co.
607 Q. You are not and have not been in the employ of the Chicago, Rock Island and Pacific Railway Company?
A. No, sir; never.

Recross-examination.

Examined by Mr. STEWART on behalf of the plaintiff:

608 Q. Were those express companies using the Rock Island road at that time?
A. The United States was on the Rock Island.
609 Q. And they were interested in the matter of the wreck at that time?
A. Nothing; only our messenger safe was in there, and I went out to look after it.
610 Q. That was burned up?
A. Yes, sir.
611 Q. With some express packages?
A. Yes, sir.
612 Q. Well, in that way the company was interested, then, to know how the wreck occurred?
A. Yes, but we are not responsible for that outside of the
300 railroad. The railroad company had a package of money of ten dollars in there, which we immediately remunerated them for.

A. R. RAMSEY.

Witness excused.
All of said deposition was excluded.

Mrs. NETTIE COLLIER, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified to, deposeth and sayeth as follows, viz:

Examined by R. J. GREENE on behalf of the defendant:

613 Q. Mrs. Collier, where do you live at the present time—what city and country?
A. Lincoln, Nebraska.
614 Q. Where were you living in August, 1894?
A. In Lincoln.
615 Q. Where were you on the 9th of August, 1894?
A. In the Rock Island wreck; the Rock Island train, I believe.
616 Q. Were you a passenger on the train that was wrecked a few miles south and east of Lincoln on the night of the 9th of August, 1894?
A. I most assuredly was.
617 Q. How soon after the train was wrecked was it before you was out of the wreck on the ground?

A. I couldn't say as to that; it wasn't very long.
618 Q. Just a few minutes?
A. A few minutes, I should judge.
619 Q. Who did you see?
A. Well, I seen a good many, but couldn't call their names, there at the time. I remember the Seidells.
620 Q. Who was with you?
A. My sister-in-law.
301 621 Q. What colored man did you see?
A. I seen just one.
622 Q. Who was that?
A. That was Davis, I should judge.
623 Q. How soon was that after you got out of the train?
A. Well, it was a few minutes after I was taken out that I seen him on the hill.
624 Q. By a few minutes you mean a very few minutes?
A. I couldn't say just how long.
625 Q. With reference to the time you saw other people, did you see him first or the others first?
A. Well, there was so many got out of the car and I was pretty excited. I should judge I seen him about as quick as I seen any of them.
626 Q. Did you see him have any conversation with any one?
A. The first time I seen him was when my sister-in-law had her hands on his shoulder and requested him to go down and help the sufferers, and what made me notice it was she had her hands on his shoulders, and then she asked him to go down and help the sufferers, and then was when I seen the colored man.
627 Q. What did your sister-in-law say to him?
A. She asked him to go down, for God's sake, and help those suffering.
628 Q. What did he do?
A. Gave a peculiar yell and went down to the train.
629 Q. What is your sister-in-law's name?
A. Mrs. Rutherford.
630 Q. Was she on the train with you?
A. Yes, sir.
631 Q. You remember the names of any others on the train?
302 A. Col. Bills was one, and there were others, but I don't remember their names.
632 Q. The brakeman; do you remember his name?
A. Yes, sir; Mr. Foote.

Cross-examination.

Examined by Mr. STEWART:

633 Q. Where did you get on that day?
A. Topeka, Kansas.
634 Q. Were there many in the coach you were in?
A. Well, not very many. There were three ladies of us.
635 Q. And about how many gentlemen?

A. Well, I couldn't say positively.

636 Q. Well, as near as you can remember?

A. Well, I see Mr. Bills and some gentlemen with him, and that German woman and her husband and child, and Mr. Foot, and some gentleman Mr. Foot was talking to across the way.

637 Q. What town did the *did the* train stop at just prior to the wreck?

A. I couldn't say.

638 Q. You remember of its stopping anywhere along there?

A. No, sir; I don't remember.

639 Q. You know anybody that was in the front coach?

A. No, sir; I do not.

640 Q. Didn't see anybody go in there?

A. I did not, only the conductor.

MRS. NETTIE COLLIER.

Witness excused.

Certificate.

STATE OF NEBRASKA, } ss:
Lancaster County, }

303 I, P. F. Greene, a notary public in and for Lancaster county, State of Nebraska, duly commissioned and qualified, do hereby certify that Wm. Lonsdale, O. B. Ramey, Lewis Ryan, Fred Foster, Bert Cambridge, Lettie Seidell, Walter Seidell, Ernest Shellenberger, Wm. Weems, Fred Lonsdale, Lon Cambridge, and Mrs. Nellie Collier were by me first severally duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them respectively subscribed as above set forth were taken down in shorthand by Victor Seymour, stenographer, subsequently extended in longhand, and respectively subscribed by the said witnesses in my presence, and were taken October 21, 22, 23, 1896, at the office of L. W. Billingsley and R. J. Greene, at 210 So. 11th street, in the city of Lincoln, county of Lancaster, and State of Nebraska, the time and place in the annexed notice specified; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit, and that said depositions were commenced October 21st, 1896, the time in said notice specified.

In testimony whereof I have hereunto set my hand and notarial seal, at Lincoln, Nebraska, this November 7th, 1896.

P. F. GREENE,
Notary Public.

[SEAL.]

Costs.

Swearing witnesses	$1.50
Issuing 3 subpœnas for eighteen witnesses	1.50
205 folios	41.00
1 certificate	.25
Postage	
Serving subpœnas for 18 witnesses	9.00
Mileage	3.10
	56.35

304 COPY OF EXHIBIT 1.

Letters of Administration.

STATE OF NEBRASKA, } ss:
Lancaster County, }

In the County Court.

To all to whom these presents shall come, Greeting:

Know ye that whereas John R. Matthews, of the county of Lancaster and State of Nebraska, died intestate on or about the 9th day of August, A. D. 1894, at Lancaster county, having at the time of his decease personal property and effects in this State, to the end, therefore, that said property and debts may be collected, preserved, administered, and distributed according to law, Webster Eaton is hereby appointed administrator of all and singular the goods, chattels, rights, credits, and effects which were of the said John R. Matthews' estate at the time of his decease, with full power and authority to secure and collect the said property and debts, wheresoever the same may be found in this State, and in general to do and perform all other acts which now are or hereafter may be required of him by law.

In witness whereof I have hereunto set my hand and affixed the seal of said county court, at my office, in Lincoln, this 19th day of April, 1895.

I. W. LANSING,
County Judge.

[SEAL.]

In the County Court of Lancaster County, Nebraska.

LANCASTER COUNTY, ss:

I certify that the annexed instrument is a complete and
305 correct copy of the letters of administration issued by said court to Webster Eaton in the matter of estate of John R. Matthews, deceased, as appears from the original on file in this office, and that the same are now in force.

Witness my hand and seal of said court this 14th day of November, A. D. 1896.

[SEAL.]

L. ARCHMAN,
County Judge of Lancaster County, Nebraska.

The above and foregoing is all the evidence offered and all the evidence introduced on the trial of said case.

In the District Court of Thayer County, Nebraska.

WEBSTER EATON, Administrator, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

And the defendant in the above-entitled cause, in the district court of Thayer county, seventh judicial district of Nebraska, having, within the time heretofore allowed by the court for that purpose, reduced to writing in its bill of exceptions all the testimony and evidence adduced or offered on both sides of the before-named cause in the before-named court, all of the objections, with the grounds therefor made, to the admission of testimony; all of the rulings of the court on such objections, and all of the exceptions to such rulings made and taken at the time, and having served the same on the
306 attorney for the above-named plaintiff according to law for examination and amendment, the amendments suggested by plaintiff having been accepted by defendant, and the same being now before me, the undersigned judge, before whom said cause was tried, on the motion of the attorneys for the defendant that the same may be settled, allowed, signed, sealed and made a part of the record in the said cause in the said court:

Now, I, the said judge, do hereby certify that this bill of exceptions contains all the testimony and evidence adduced or offered by the plaintiff and defendant on the trial of said cause, all of the objections to the admission of testimony, all of the rulings of the court on such objections, and all of the exceptions taken to such rulings at the time; and I do hereby order that it be made a part of the record in the said cause in the said court, which is accordingly done.

Done at Hebron, Nebraska, this 2nd day of January, 1897.

W. G. HASTINGS,
Judge of the District Court.

I, G. W. Wasson, clerk of the district court of Thayer county, in the seventh judicial district of Nebraska, do hereby certify that this is the original bill of exceptions filed in the office of said clerk in said cause.

In testimony whereof I hereunto set my hand and affix the official seal of said court this 8th day of January, 1897.

GEO. W. WASSON,
[SEAL.] *Clerk of the District Court.*

I hereby certify that this transcript contains all of the evidence adduced or offered on the hearing of the above cause at the November term, 1896, of the district court of Thayer county, Nebraska.

——— ———,
Official Reporter.

307 And afterwards, to wit, on the 15th day of January, 1898, there *was* filed in the office of the clerk of said court a certain motion, notice, and stipulation in words and figures following, to wit:

In the Supreme Court of the State of Nebraska.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
WEBSTER EATON, Administrator of the Estate of John R. Mathews, Deceased, Defendant in Error.

Comes now the plaintiff in error and moves the court that the time for serving and filing briefs herein be extended until October 1, 1898, as per agreement of counsel.

W. F. EVANS,
L. W. BILLINGSLEY, &
R. G. GREENE,
Attorneys for Plaintiff in Error.

To Webster Eaton, administrator of the estate of John R. Mathews, deceased, defendant in error, and Stewart & Munger, his attorneys:

You are hereby notified that on February 15, 1898, or as soon thereafter as counsel can be heard, plaintiff in error will present the above motion to the supreme court and ask that it be sustained.

W. F. EVANS,
L. W. BILLINGSLEY, &
R. J. GREENE,
Attorneys for Plaintiff in Error.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause that the time for serving and filing briefs of plaintiff in error herein be extended until October 1, 1898, and
308 that defendant in error have twenty days from the date of service of the brief of plaintiff in error in which to serve and file briefs, provided that if the above case shall be advanced or set for hearing before Jan. 1, 1899, then plaintiff in error's briefs to be serve- 90 days prior to time of hearing.

W. F. EVANS,
L. W. BILLINGSLEY, &
R. J. GREEN,
Attorneys for Plaintiff in Error.
STUART & MUNGER,
Attorneys for Defendant in Error.

Rec'd copy above notice Jan. 12, 1898.
STEWART & MUNGER,
Att'ys for —.

Endorsement: No. 9150. Chicago, R. I. & P. R'y *v.* Eaton. Jan'y 18, '98. Parties to file briefs as per stipulation on file. Motion and etc. Supreme court of Nebraska. Filed Jan. 15, 1898. D. A. Campbell, clerk.

And afterward, to wit, on the 19th day of Jan., 1898, the following order was made by said court and entered of record, to wit:

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. *v.* WEBSTER EATON, ADM'R, ET AL. } Error from the District Court of Thayer County. No. 9150.

Upon motion of the plaintiff in error herein, leave is hereby given him by the court to serve and file its briefs herein on or before October 1, 1898.

And afterward, to wit, on the 12th day of January, 1899, there was filed in the office of the clerk of said court a certain motion in the words and figures following, to wit:

In the Supreme Court of Nebraska.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error, *v.* WEBSTER EATON, Adm., etc., Defendant in Error.

Comes now the defendant in error and moves the court to dismiss the proceedings in error herein for the reason that the plaintiff in error has failed to serve and file briefs in accordance with the provisions of rule 9 of this court.

STEWART & MUNGER,
Attorneys for Defendant in Error.

309 To L. W. Billingsley and R. J. Greene, attorneys for plaintiff in error:

You are hereby notified that we have filed a motion in the supreme court, of which the above is a true copy, and will submit the same to the said court for its decision at the opening of such court, on the 17th day of January, 1899, or as soon thereafter as counsel can be heard.

STEWART & MUNGER,
Attorneys for Defendant in Error.

Received a copy of the above notice and motion this 12 day of January, 1899.

L. W. BILLINGSLEY AND
R. J. GREENE,
Attorneys for The Chicago, Rock Island and Pacific Railroad Company, Plaintiff in Error.

Endorsement: No. 9150. Chicago, Rock Island and P. R. Co. *v.* Eaton. Motion to dismiss and notice. Supreme court of Nebraska. Filed Jan. 12, 1899. D. A. Campbell, clerk.

And afterwards, to wit, on the 17th day of January, 1899, there was rendered by said court a certain order in words and figures following, to wit:

THE CHICAGO, ROCK ISLAND AND Pacific Railway Company, Plaintiff in Error, v. WEBSTER EATON, Adm'r, Defendant in Error.	Error from the District Court of Thayer County. No. 9150.

Upon motion of defendant in error, it is by the court ordered that the plaintiff in error serve and file briefs herein within twenty days from this date.

310 And afterwards, to wit, on the 7th day of March, 1900, there was rendered by said court and entered of record a certain judgment in words and figures following, to wit:

THE CHICAGO, ROCK ISLAND AND Pacific Railway Company, Plaintiff in Error, v. WEBSTER EATON, Administrator of the Estate of John R. Mathews, Deceased, Defendant in Error.	Error from the District Court *Court* of Thayer County. No. 9150. Judgment of Affirmance.

This cause came on to be heard, was taken up and argued by counsel; on consideration whereof the court finds there is no error apparent on the record in the proceedings and judgment of the district court. It is therefore considered by the court that said judgment be, and the same hereby is, affirmed, and that the defendant in error recover of the plaintiff in error his costs, taxed at $—, and that a mandate issue accordingly.

And on the same day, to wit, the 7th day of March, 1900, there was filed in the office of the clerk of said court a certain opinion in words and figures following, to wit:

311 THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY CO. v. WEBSTER EATON, Adm'r.

Opinion.

Filed Mar. 7, 1900.

NORVAL, *C. J.*:

The facts and the questions of law in this case are identical with those in the Chicago, Rock Island & Pacific Railway Company *v.* Zernecke, administratrix, decided herewith. As the law applicable to the former case is also applicable in this, we do not deem it necessary to discuss it, and the judgment of the lower court is affirmed.

312 THE STATE OF NEBRASKA, *ss*:

I, D. A. Campbell, clerk of the supreme court of said State, do hereby certify that the foregoing is a full, true, and complete transcript of the record and proceedings in the case of The Chicago, Rock

Island and Pacific Railway Company, plaintiff in error, against Webster Eaton, administrator of the estate of John R. Mathews, deceased, defendant in error, as fully as the same remains on file and of record in my office.

Seal Supreme Court of Nebraska.

In testimony whereof I have hereunto set my hand and causd to be affixed the seal of said court, at the city of Lincoln, this 25th day of April, A. D. 1900.

D. A. CAMPBELL, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled 4, 25, 1900. D. A. C.]

313 In the Supreme Court of the State of Nebraska.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
WEBSTER EATON, Administrator of the Estate of John R. Mathews, Deceased, Defendant in Error.
} No. 9150.

Comes now The Chicago, Rock Island and Pacific Railway Company, plaintiff in error in the above-entitled cause, and says that in the record and proceedings of the supreme court of Nebraska in said cause there is manifest error, in this, to wit:

I.

That said supreme court of the State of Nebraska erred in rendering judgment against said plaintiff in error and in favor of said defendant in error.

II.

That said supreme court of the State of Nebraska erred in failing and refusing to render judgment in favor of said plaintiff in error and against said defendant in error.

III.

That said supreme court of the State of Nebraska erred in affirming the judgment of the district court of Nebraska within and for Thayer county.

IV.

That said supreme court of the State of Nebraska erred in holding and deciding that section 3 of article 1 of chapter 72 of
314 the Compiled Statutes of the State of Nebraska is not inimical to the Constitution of the United States.

V.

That said supreme court of the State of Nebraska erred in holding and deciding that said section 3 of article 1 of chapter 72 of the Compiled Statutes of the State of Nebraska is not inimical to the fourteenth amendment to the Constitution of the United States, as tending to deprive railway companies of their property without due process of law.

VI.

That said supreme court of the State of Nebraska erred in holding and deciding that said section 3 of article 1 of chapter 72 of the Compiled Statutes of the State of Nebraska is not contrary to and in conflict with the Constitution of the United States.

VII.

That said supreme court of the State of Nebraska erred in holding and deciding that said section 3 of article 1 of chapter 72 of the Compiled Statutes of the State of Nebraska is not contrary to and in conflict with the fourteenth amendment to the Constitution of the United States, as tending to deprive railway companies of their property without due process of law.

VIII.

That said supreme court of the State of Nebraska erred in holding and deciding that proof of injury to a person while being transported over a railroad as a passenger creates a conclusive presumption under said section 3 of article 1 of chapter 72 of the Com-
315 piled Statutes of said State of Nebraska that such injury was caused by the negligence of the carrier.

IX.

That said supreme court of the State of Nebraska erred in holding and deciding that proof of the death of a person while being transported over a railroad as a passenger creates a conclusive presumption, under said section 3 of article 1 of chapter 72 of the Compiled Statutes of the State of Nebraska, that such death was caused by the negligence of the carrier.

X.

That said supreme court of the State of Nebraska erred in holding and deciding that said section 3 of article 1 of chapter 72 of the Compiled Statutes of the State of Nebraska creates a conclusive presumption of negligence against carriers in all cases where persons are injured while being transported over railways as passengers, except when it is disclosed that the injury was one caused by the passenger's own criminal negligence or by his violation of some rule of the company or carrier brought to his actual notice.

XI.

That said supreme court of the State of Nebraska erred in holding and deciding that said section 3 of article 1 of chapter 72 of the Compiled Statutes of the State of Nebraska creates a conclusive presumption of negligence against carriers in all cases where persons are killed while being transported over railways as passengers, except when it is disclosed that such a death was caused by the
316 passenger's own criminal negligence or the violation of some rule of the company or carrier brought to his actual notice.

XII.

That said supreme court of the State of Nebraska erred in holding and deciding that by said section 3 of article 1 of chapter 72 of the Compiled Statutes of the State of Nebraska railroad companies are made insurers of the safety of their passengers.

XIII.

That said supreme court of the State of Nebraska erred in holding and deciding that the plaintiff in error was and is liable in the case at bar for damages resulting from the death of the deceased, John R. Mathews, said death having been caused by the criminal act of a third person without fault on the part of the plaintiff in error.

XIV.

That said supreme court of the State of Nebraska erred in holding and deciding that the following statute of said State of Nebraska is not contrary to and in conflict with the Constitution of the United States: "Every railroad company as aforesaid shall be liable for all damages inflicted on the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice."

(Section 3, article 1, chapter 72, Compiled Statutes.)

317 Wherefore your petitioner respectfully prays that a writ of error may be issued in said cause, directed to the clerk of the supreme court of the State of Nebraska, commanding said — to certify and send to the Supreme Court of the United States a full and complete transcript of the record and all proceedings of said supreme court of the State of Nebraska in said cause, wherein The Chicago, Rock Island and Pacific Railway Company is plaintiff in error and Webster Eaton, administrator of the estate of John R. Mathews, deceased, is defendant in error, and that said judgment of said supreme court of the State of Nebraska in said cause, and every part thereof, may be reversed by the Supreme Court of the United States; and your petitioner will ever pray.

M. A. LOW,
W. F. EVANS,
L. W. BILLINGSLEY, AND
R. J. GREENE,
Attorneys for Plaintiff in Error.

318 [Endorsed:] 9150. The Chicago, Rock Island & Pacific Railway Company, plaintiff in error, *vs.* Webster Eaton, administrator of the estate of John R. Mathews, dec'd, defendant in error. Supreme court Nebraska. Assignment of errors. Supreme court of Nebraska. Filed Apr. 7, 1900. D. A. Campbell, clerk.

319 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Nebraska, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Chicago, Rock Island & Pacific Railway Company, plaintiff in error, and Webster Eaton, administrator of the estate of John R. Mathews, deceased, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the
320 construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Chicago, Rock Island & Pacific Railway Company, plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 11th day of April, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

320½ THE STATE OF NEBRASKA, ss:

In obedience to the command of the within writ, I, D. A. Campbell, clerk of the supreme court of said State, herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same, to wit, assignment of errors, writ of error, copy of bond, and citation and proof of service.

Seal Supreme Court of Nebraska.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of said court, at the city of Lincoln, this 25th day of April, A. D. 1900.

D. A. CAMPBELL, *Clerk*.

[Ten-cent U. S. internal-revenue stamp, canceled 4. 25, 1900. D. A. C.]

[Endorsed:] 9150. The Chicago, Rock Island & Pacific Railway Company *v.* Webster Eaton, administrator of the estate of John R. Mathews, deceased. Writ of error. Supreme court of Nebraska. Filed Apr. 16, 1900. D. A. Campbell, clerk.

321 And afterwards, to wit, on the 16th day of April, 1900, there was filed in the office of the clerk of said court a certain bond in words and figures following, to wit:

In the Supreme Court of the State of Nebraska.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILway Company, Plaintiff in Error,
v.
WEBSTER EATON, Administrator of the Estate of John R. Mathews, Deceased, Defendant in Error.
} No. 9150. Bond.

Know all men by these present- that we, the Chicago, Rock Island and Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa, and W. H. Dorgan and J. D. Parker, of the city of Lincoln, State of Nebraska, are held and firmly bound unto the said Webster Eaton, administrator of the estate of John R. Mathews, deceased, defendant in error, his heirs, executors, and administrators, in the sum of ten thousand dollars ($10,000.00); to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, successors, executors, and administrators, firmly by these presents.

Sealed with our seals this 4 day of April, 1900.

Whereas the above-named The Chicago, Rock Island and Pacific Railway Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Nebraska:

Now, therefore, the condition of this obligation is such that if the above-named The Chicago, Rock Island and Pacific Railway Com-

pany shall prosecute its said writ of error to effect and answer
322 all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

THE CHICAGO, ROCK ISLAND AND
[SEAL.] PACIFIC RAILWAY COMPANY,
By W. F. EVANS,
Its Agent and Assistant General Attorney.
[SEAL.] W. H. DORGAN.
[SEAL.] J. D. PARKER.

Approved by—
DAVID J. BREWER,
Associate Justice, Supreme Court of U. S.

Apr. 11th, 1900.

THE STATE OF NEBRASKA, *ss:*

I, D. A. Campbell, clerk of the supreme court of Nebraska, do certify that I am acquainted with W. H. Dorgan and J. D. Parker, sureties on the foregoing bond.

I further certify that I consider the sureties amply sufficient and good for the sum of ten thousand dollars over and above all incumbrances and exemptions, and were I taking said bond I would approve the same.

In testimony whereof I have hereunto set my hand and seal of said supreme court this 7th day of April, A. D. 1900.

D. A. CAMPBELL,
[SEAL.] *Clerk of Supreme Court of Nebraska.*

Endorsement: No. 9150. The Chicago, Rock Island and Pacific Railway Company *v.* Webster Eaton, administrator of the estate of John R. Mathews, deceased. Bond. Supreme court of Nebraska. Filed Apr. 16, 1900. D. A. Campbell, clerk.

323 UNITED STATES OF AMERICA, *ss:*

To Webster Eaton, administrator of the estate of John R. Mathews, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of State of Nebraska, wherein The Chicago, Rock Island & Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 11th day of April, in the year of our Lord one thousand nine hundred.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

324 On this 16th day of April, in the year of our Lord one thousand nine hundred, personally appeared J. H. Maden before me, the subscriber, clerk of the supreme court of the State of Nebraska, and makes oath that he delivered a true copy of the within citation to Thomas C. Munger, a member of the firm of Stewart & Munger, the attorneys of record of the within-named Webster Eaton, administrator of the estate of John R. Mathews, deceased.

J. H. MADEN.

Sworn to and subscribed the 16th day of April, A. D. 1900.

[Seal Supreme Court of Nebraska.]

D. A. CAMPBELL,
Clerk of the Supreme Court of the State of Nebraska.

[Endorsed:] 9150. The Chicago, Rock Island & Pacific Railway Company *v.* Webster Eaton, administrator of the estate of John R. Mathews, deceased. Citation. Supreme court of Nebraska. Filed Apr. 16, 1900. D. A. Campbell, clerk.

Endorsed on cover: File No., 17,748. Nebraska supreme court. Term No., 273. The Chicago, Rock Island and Pacific Railway Company, plaintiff in error, *vs.* Webster Eaton, administrator of the estate of John R. Mathews, deceased. Filed May 10th, 1900.

1129

No. 273.

Office Supreme Court U.S.
FILED
APR 15 1901
JAMES H. MCKENNEY,
Clerk.

Brf. of Evans & Low for P. in E.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

Filed April 15, 1901.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

v

WEBSTER EATON, ADMINISTRATOR OF THE ESTATE OF JOHN R. MATHEWS, DECEASED, *Defendant in Error.*

No. 273.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

This action was brought in the court below by the defendant in error to recover from the plaintiff in error damages that resulted from the death of John R. Mathews, deceased, who was killed upon the railway of the plaintiff in error in Lancaster County, State of Nebraska, by the criminal act of one George Washington Davis, on the 9th day of August, 1894. Davis killed the deceased and ten other persons, one of whom was Wm. O. Ham-

bel, by tearing up the track of the plaintiff in error, and derailing one of its passenger trains, upon which the deceased and the other ten persons, who were killed, were being transported by the plaintiff in error as passengers.

Davis was thereafter indicted, tried, and convicted of murder in the first degree for the killing of said Wm. O. Hambel at the time and in the manner above stated. His case was appealed to the Supreme Court of that State, where the judgment of the trial court was affirmed, and he is now confined in the penitentiary of said State, serving a life sentence as his punishment for said crime.[1]

In stating his cause of action against the railway company the plaintiff in his petition avers:

1.

"The plaintiff above named complains of the defendant and alleges that on the 19th day of April, 1895, this plaintiff was duly appointed and qualified as administrator, and letters of administration of the estate of John R. Mathews, deceased, were duly issued and granted to him by the probate court of Lancaster County, Nebraska, and the plaintiff sues as such administrator.

2.

"That the defendant——and at the time hereinafter mentioned was a corporation, duly incorporated under the laws of the State of Nebraska, and owned and operated a railroad therein known as the Chicago, Rock Island and Pacific Railway, and was and is a common carrier of passengers for hire between the places hereinafter mentioned and between the stations of Fairbury, Nebraska, and Lincoln, Nebraska, all of which railroad between said stations is in the State of Nebraska.

3.

"On or about the 9 day of August, 1894, the

[1] Davis v. State, 51 Neb. 301.

said defendant, in consideration of the sum of $1.70, received the said John R. Mathews, then living, as a passenger on said railroad from Fairbury, Nebraska, to Lincoln, Nebraska, and while said John R. Mathews was on the cars on the said journey as a regular passenger, at a distance of about five miles south of Lincoln, Nebraska, and in this State, the car in which said John R. Mathews was riding was, by the negligence of the defendant and its servants, derailed and thrown from and ran off the track, and that said John R. Mathews was, without fault or neglect on his part, thereby killed.

4.

"Plaintiff further alleges that R. H. Mathews, as father, and his wife, Mrs. R. H. Mathews, as mother of the said John R. Mathews, are next to kin and heirs at law of said John R. Mathews, and that they were partially dependent upon him for support, and received from him for such support and contribution the sum of $250.00 per year, and they and each of them have been permanently deprived of the service and support and contributions from the date of his said death, and of the reasonable expectation of such continued and other pecuniary assistance, benefit, contributions and support in the future during their and his probable duration of life, and have sustained damages by reason of defendant's and their servants' negligence in the loss and damage described, and have suffered damage in all to the sum of $5,000.00, for which, with costs of suit, plaintiff prays judgment."[1]

The plaintiff in error answered as follows:

"Comes now, said defendant, and for answer to plaintiff's petition in the above entitled cause denies all and singular the allegations thereof, except such as are hereinafter expressly admitted.

2.

"Further answering, the defendant admits and avers:

[1] Record, 7, 8.

1.

"That it is and at all times mentioned in said petition was a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa, and a domestic corporation of the State of Nebraska.

2.

"That at all times mentioned in said petition it was the owner of and was operating a railroad in the State of Nebraska, and was and is a carrier of passengers for hire between the stations of Martel, Nebraska, and Lincoln, Nebraska, on said railway. But the defendant denies that the said John R. Mathews, deceased, mentioned in said petition, was injured in any way by reason of the carelessness or negligence of this defendant, or any of its servants, agents or employes, and denies that the said John R. Mathews was killed by reason of any carelessness or negligence on the part of the defendant, or any of its servants, agents or employes.

3.

"Further answering, the defendant avers that on or about the 9th day of August, 1894, near Lincoln, in the County of Lancaster, State of Nebraska, and at the time in said petition stated, the train and car mentioned in said petition, while being run and operated with all possible care and caution, were, by some person or persons not in the employ or under the control of the defendant and without its knowledge wilfully, maliciously and feloniously derailed and thrown from the track on which they and each of them were at said time being run and operated, resulting in great loss to the defendant, its servants, agents and employes; that said person or persons who derailed and threw said train and car from the track as aforesaid, wilfully, maliciously and feloniously removed and displaced from the track aforesaid at the point of said derailment certain spikes, nuts, angle-bars, fish-plates, bolts and rails, and otherwise tore up and destroyed said track of defendant at the point aforesaid, and caused said car and train to be derailed and thrown from the track, as aforesaid, without

any carelessness or negligence on the part of the defendant, or any of its agents, servants or employes; that said car and train at the time of being derailed and thrown from the track, as aforesaid, and at all other times, was operated and run in a skillful and proper manner and with great care and caution; that the said railroad and track at the point aforesaid and at all other points was kept and maintained in good and safe condition and repair, and that the defendant did not know, and had no means of knowing, at the time of said derailment or prior thereto, of the removal or displacement from said track of said nuts, bolts, angle-bars, fish-plates and rails or either of them, and did not know and had no means of knowing that said track at said point had been torn up or destroyed, and that the defendant could not by the exercise of the utmost care, caution, prudence and foresight have prevented said derailment and wrecking of said train and car.

"The defendant avers that as to whether said John R. Mathews, mentioned in said petition, was on said train or car at the time of said derailment it has not knowledge or information thereof sufficient to form a belief, and that as to whether the said plaintiff was on the 19th day of April, 1895, or at any other time, duly appointed and qualified as administrator of the estate of said John R. Mathews, deceased, the defendant has not knowledge or information thereof sufficient to form a belief.

"And, having fully answered, the defendant asks to be discharged hence with its costs in this behalf laid out and expended."[1]

The statute upon which this action is founded, and which is the only statute of Nebraska giving or creating a right of action for the death of a person, is as follows:

"An Act authorizing the recovery of damages by the personal representatives of a person whose death is caused by the wrongful act of a person, company or corporation:

[1] Record, 9, 10.

"SECTION 1. That wherever the death of a person shall be caused by the wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, in respect thereof, then, and in every such case, the person who, or the company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."[1]

This act is the same as the act known as "Lord Campbell's act," passed in 1846.

It will be observed both from the body and title of this act that a cause of action is not created unless the death "shall be caused by the wrongful act, neglect, or default" of the person sought to be charged.

Upon the trial the defendant in error introduced evidence tending to prove that at the time the deceased was killed he was being transported over the railway of the plaintiff in error; and that the train upon which he was traveling was derailed and thrown from the track, resulting in his death and the death of ten other persons. The railway company then called many witnesses and offered to prove by them the way and manner in which the railway and train were constructed, operated and maintained at all times in question; that it was not guilty of any negligence or carelessness in the construction, operation or maintenance of them or either of them;

[1] Comp. Laws of Neb., 1899, p. 491.

that the death of the deceased was not "caused by the wrongful act, neglect or default" of the plaintiff in error; that it could not by the exercise of the greatest care, caution, prudence and foresight have prevented the derailment of said train or the death of said deceased; and that the deceased was killed by Davis in the manner above stated.

Notwithstanding the statute upon which the action is based, and upon which it must be maintained, if at all, provides that before a recovery can be had the death "shall be caused by the wrongful act, neglect or default" of the party sought to be charged, the court denied the offer and excluded the evidence. The court also, upon the motion of the defendant in error, suppressed the depositions of several witnesses for the plaintiff in error, which showed clearly and without conflict that the death of the deceased was not caused by the "wrongful act, neglect, or default" of the plaintiff in error. [1]

At the close of the evidence the court, on motion of the defendant in error, instructed the jury as follows:

1.

"The jury is instructed that if you find from the evidence that John R. Mathews was a passenger, being carried on the train of the defendant railway company that was derailed and wrecked near Lincoln, Nebraska, on August 9, 1894, thereby causing the death of said Mathews, and that plaintiff is the administrator of the estate of said Mathews, then you should find for the plaintiff if you find a pecuniary loss from such death has resulted to the next of kin, in this case, the father." [2]

[1] Record, 13-24.

[2] Record, 25.

The jury returned a verdict in favor of the plaintiff below for $1,500.00, upon which judgment was rendered against the railway company. The plaintiff in error, by proper proceedings, took the case to the Supreme Court of the State, where the judgment of the trial court was affirmed,[1] and it then brought the case to this court.

The Supreme Court, in deciding and rendering judgment against the plaintiff in error, held and adjudged that the following statute of that State, passed in 1867, created a *conclusive presumption of negligence* against the plaintiff in error:

"Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice."[2]

The district court and the Supreme Court of the State held that it *was finally and conclusively determined* by the statute just quoted that the death of the deceased was "caused by the wrongful act, neglect or default" of the plaintiff in error and that evidence on the part of the plaintiff in error respecting the manner in which the deceased was killed was incompetent and could not be considered in any way, unless it showed that the deceased was killed by his *own criminal negligence.*

[1] Record, 193.

[2] Comp. Laws of Neb. 1899, p. 838.

The opinion of the Supreme Court is as follows:

"The facts and questions of law in this case are identical with those in the case of the *Chicago, Rock Island and Pacific Railway Company v. Zernecke, Administratrix*, decided herewith. As the law applicable to the former case is also applicable to this, we do not deem it necessary to discuss it, and the judgment of the lower court is affirmed."[1]

The facts in the case of the *Chicago, Rock Island and Pacific Railway Company v. Zernecke*,[2] referred to in the opinion just quoted, are the same as those in the case at bar, and in that case the Supreme Court, in referring to the statute, said:

"It gives or creates a right of action in favor of the injured passenger, and when it is established that a person is injured while a passenger of the railroad company *a conclusive presumption of negligence* arises in every case, except where it is disclosed that the injury was one caused by his own criminal negligence or by his violation of some rule of the company brought to his actual notice. . . . In other words, *a conclusive presumption of negligence* arises when the case does not fall within the exceptions of the law and he has his right of action. . . . Now it is indisputable that if Zernecke had been injured merely, and not killed, he would have recovered against the railway company under said section 3, article 1, of chapter 72, and that thereunder said injuries would have been deemed to have been caused by the wrongful acts, neglect or default of the said railway company in failing to carry such passenger safely. Hence this case falls within the scope of said chapter 21 and the *fact of negligence*, or defendant's *wrongful acts or default is established* when the evidence discloses the facts specified in said section 3 of chapter 72."

The plaintiff in error contended in the trial court, as

[1] Record, 193.

[2] —Neb.— 82 N. W. Rep. 26, 27.

well as in the Supreme Court, that this statute, that is, the one *creating a conclusive presumption of negligence* was and is in contravention of the Fourteenth Amendment to the Federal Constitution, and that it deprives the railway company of its property "without due process of law" and denies to it "the equal protection of the laws." This contention was denied by the Supreme Court and by the trial court.

SPECIFICATIONS OF ERROR.

Said plaintiff in error says that in the record and proceedings of said Supreme Court of the State of Nebraska, in said cause, there is manifest error in this:

1. That said court erred in affirming the judgment of the district court of Nebraska in said cause.

2. That said court erred in rendering judgment against the plaintiff in error and in favor of defendant in error.

3. That said court violated the Fourteenth Amendment to the Federal Constitution and deprived the plaintiff in error of its property without due process of law, and denied to it the equal protection of the laws.

4. That said court erred in holding and deciding that the following statute of the State of Nebraska was not unconstitutional:

"SEC. 3. Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except

in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice."

6. That said court erred in holding and deciding that the statute set out in specification of error number four hereof was not in contravention of the Federal Constitution.

7. That said court erred in not reversing said judgment of said district court of the State of Nebraska.

8. That said court erred in holding and deciding that the statute set out in specification of error number four hereof was not in contravention of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

"Sec. 3. Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice."[1]

This statute, as construed by the Supreme Court of the State, which construction is conclusive upon this court and cannot be "re-examined here as to its propriety or accuracy," is in contravention of the Fourteenth Amendment to the Federal Constitution in this, that when enforced it deprives the plaintiff in error of its property "without

[1] Comp. Laws of Neb. 1899, p. 838.

due process of law" and denies to it "the equal protection of the laws."[1]

1. The statute known as "Lord Campbell's act" is the only statute in Nebraska which creates or gives a right of action for the death of a person, and it, as well as all other statutes of that character, expressly provides that an action can be maintained only where the death shall be caused by the "wrongful act, neglect, or default" of the person sought to be charged. In other words, no right of action is given when the death is not caused by wrongful act, neglect, or default. The right of recovery and the liability in all cases must be measured and determined by this statute, and the liability is not imposed or created except on the conditions therein stated. The right of the plaintiff in error to be heard and present evidence on the determination of this question of fact is reserved by the statute upon which the action is based and protected by the Fourteenth Amendment to the Federal Constitution. But the law-making power of the State attempts by this statute of 1867 to create a *conclusive* presumption of negligence against the railway company; to adjudge and to determine conclusively, without a hearing and without a trial, that the plaintiff in error was guilty of a wrongful act, neglect, or default,

[1] Ry. Co. v. Minn., 134 U. S. 418, 456. | Ry. Co. v. Ill., 163 U.S. 142, 152. Ry. Co. v. Neb., 164 U.S. 403, 414.

and that it resulted in the death of the deceased, and to deny a trial and a hearing in the determination of this question. The right of defense—the right of a trial, and the right to controvert by proof every material fact which bears on or involves the question of liability—is just as valuable and is protected to the same extent as the right of action or the right to sue. They are relative rights and are of the same value and importance and protected to the same extent by the Federal Constitution.

This right has been well stated by this court, as follows:

"Wherever one is assailed in his person or his property there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations."[1]

Again:

"The liability and the right are inseparable. A different result would be a blot on our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and the right administration of justice."[2]

The lawmaking power cannot determine by an act that the plaintiff in error has been negligent or careless, or that a *conclusive* presumption of negligence or carelessness arises against the carrier from proof that a passenger was injured, regardless of the manner in which the injury was sustained.

[1] Windsor v. McVeigh, 93 U. S. 274, 277.

[2] McVeigh v. U. S., 11 Wall. 259, 267.

Mr. Webster, in speaking of the powers of the Legislature and their separation from the judicial functions of the government, said:

"It (the Legislature) shall not adjudge by act; it shall not decide by act; it shall not deprive by act, but it shall leave all things to be tried and adopted by the law of the land."

Referring to "due process of law," Mr. Cooley says:

"Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. . . Everything which may pass under the form of an enactment is not therefore to be considered the law of the land.'

"The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry' and 'render judgment only after trial.' It is entirely correct, also, in assuming that a legislative enactment is not necessarily the law of the land. The words 'by the law of the land,' as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense."[1]

"The idea," says Mr. Justice HARLAN, in speaking for this court, "that any legislature, state or federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law is in opposition to the theory of our institutions. The duty rests upon all courts, federal and state, when their jurisdiction is properly invoked to see to it that no right secured by the supreme law of the land is impaired or destroyed by a legislature. This function and duty of

[1]Cooley's Const. Lim. 6th ed. 431.

the judiciary distinguishes the American system from all other systems of government."[1]

The Legislature by the act in question determines without a trial, without a hearing, without notice, and without inquiry, that the railway company has been guilty of negligence—that certain facts shall be *conclusive evidence of negligence* against the plaintiff in error. It is thereby deprived of any inquiry on this question and of the right of introducing evidence showing that it was not guilty of the negligence charged, and without which it was not liable.

The following language is especially applicable here:

"Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.

"We have held that it is within the power of legislation to declare that certain proofs shall be *prima facie* evidence of specified facts. But at the same time we decided that the legislature could not constitutionally ordain that such proofs should be conclusive evidence of material facts in controversy. The first is a mere rule of evidence. The last has been characterized as 'a confiscation of property.'"[2]

It is well settled that the legislature may lawfully provide what shall be received as evidence, but it cannot

[1]Smyth v. Ames, 169 U. S. 466, 527

[2]Zeigler v. South & North Ala. R. Co., 58 Ala. 594, 599.

make that *conclusive* which may be shown to be false; it cannot manufacture falsehood into truth, or give to falsehood or untruth the conclusive validity of truth.

In discussing this question, Mr. Cooley says:

"But there are fixed bounds to the power of the legislature over this subject which cannot be exceeded. As to what shall be evidence, and which party shall assume the burden of proof in civil cases, its authority is practically unrestricted, so long as its regulations are impartial and uniform; but it has no power to establish rules which, under pretense of regulating the presentation of evidence, go so far as to altogether preclude a party from exhibiting his rights. Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon like reasons, it would not, we apprehend, be in the power of the Legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations the law of the land requires an opportunity for a trial; and there can be no trial if only one party is suffered to produce his proofs."[1]

On this question the Supreme Court of Arkansas says:

"It is not within the province of the Legislature to divest rights by prescribing to the courts what should be conclusive evidence. This matter was fully considered in *Fulton Railroad Company v. Parks*, 32 Ark. 131, which arose under a statute which endeavored to make a county clerk's deed of lands, sold for taxes, *conclusive* of its recitals against the true owner. Justice Walker, in delivering the opinion, remarked: 'The Legislature may declare what shall be received as evidence, but it cannot make that conclusively true which may be shown to be false;' * * * Railroad companies have the right to run their trains, and the consequent right of being protected in doing so, unless damage to others should result from some negligence, want of due care

[1] Cooley's Const. Lim., 6th ed. p. 452.

or culpable neglect of reasonable precautions imposed by the legislative power. It affects their substantial rights of property to be able to show the facts, and they cannot be constitutionally deprived of the power."[1]

The same court, in the case of *Cairo & Fulton R. Co. v. Parks*, said:

"To make proof of certain facts by one party 'conclusive evidence of their truth,' and to deny to the party who desires the truth of them, the privilege of proving them to be false, is, in effect, manufacturing falsehood into truth, or giving to falsehood the validity and effect of truth. If the Legislature has power to do this, then, that provision in the bill of rights, which ordains that, 'no one shall be deprived of life, liberty, or property, but by the judgment of his peers, or the law of the land,' is a dead letter, because to deprive the citizen of the right to protect his property by showing that it has been taken from him contrary to law, is, in effect, denying to him the protection of the law."[2]

The Legislature may declare what shall be received as evidence, but it cannot make that conclusively true which may be shown to be false.

In the case of *Wantlan v. White*,[3] the Supreme Court of Indiana said:

"It is not competent for the legislative power to declare what shall be conclusive evidence of a fact."

Again:

"Statutes which undertake to make proof of certain facts absolute or conclusive of guilt are unconstitutional. Those which merely declare statutory presumptions affecting the burden of proof are valid."[4]

[1] L. R. & F. S. R. Co. v. Payne, 33 Ark. 816, 819.
[2] 32 Ark. 132, 145.
[3] 19 Ind. 472.
[4] Voght v. The State, 124 Ind. 358, 362.

The same principle is stated by the Supreme Court of Minnesota in the case of *Vega Steamship Company v. Consolidated Elevator Company.*[1] In that case the question involved was whether the Legislature had power to make the certificate of the public weighmaster conclusive evidence. In stating the rule for which we contend, the court said:

"But is it competent for the Legislature to make the weight thus ascertained absolutely conclusive? We are of the opinion that it is not. The Legislature cannot in this manner provide for the arbitrary exercise of power, so as to deprive a person of his day in court to vindicate his rights. And the law which closes his mouth absolutely when he comes into court is the same, in effect, as the law which deprives him of his day in court. See Cooley Const. Lim. (6th ed.) 452; 6 Am. & Eng. Ency. Law (2d ed.) 1050; *Graves v. Northern*, 5 Mont. 556, 6 Pac. 16; *Johns v. State*, 55 Md. 362, 363; *Wantlan v. White*, 19 Ind. 470."

A case directly in point is that of *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*,[2] decided by this court. In that case was involved the validity of a statute of Minnesota by which rates made and adopted by a railroad and warehouse commission were made "*not simply advisory, nor prima facie equal and reasonable, but final and conclusive.*"

This court, in holding that statute in contravention of the Federal Constitution, and, therefore, unconstitutional, used the following language:

[1] 75 Minn. 308, 312.

[2] 134 U. S. 418, 457.

"We are of opinion that . . . it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice."

Let us assume for the purpose of the argument that the Legislature could declare that proof of the possession of property shall be conclusive evidence of its ownership. Would any person contend that the act would be valid? Certainly not. Or let us assume, as the Supreme Court of Iowa says, that if "the Legislature should declare that an indictment duly found by the grand jury should be conclusive evidence of guilt against the accused, would this deprive him of his liberty without due process of law? If so, where is the line at which the legislative power begins and where does it end?"

No lawyer would contend that life or liberty could be taken by a statute similar in principle to the one in question, or that a statute reading as follows would be "due process of law" or constitutional:

"Whenever a person who is being transported on a railroad train as a passenger shall be killed, the conductor or other person in charge of the train at such time shall be guilty of murder."

Nor is it within the power of the Legislature to declare that on the trial of a person charged with murder, proof of certain facts shall be conclusive evidence of the guilt of the accused. This is elementary. Yet, life, liberty and property are placed on an equal footing by the constitution—are placed in the same category. They are grouped together in the same sentence, and each, as opposed to the unlawful deprivation thereof, is of equal constitutional importance.[1]

If the Legislature may lawfully declare that proof of any injury to a passenger shall be conclusive evidence of negligence or carelessness on the part of the carrier, it may also lawfully declare that the same proof of injury, or, in the legislative caprice, proof of any other fact, shall be conclusive evidence that the injured person was in fact a passenger of the carrier. In this direction it might go so far as to declare that proof of any injury to any person, for example, a person not in or upon any train of the carrier, but upon its track or a highway crossing, or upon its station grounds at the time of the injury, shall be conclusive evidence that the person so injured was in fact a passenger of the carrier. In this manner every question of fact involved in a case could be conclusively determined by the Legislature before trial and without a hearing of any kind.

---

[1] Wynehamer v. People, 13 N. Y. 378. | State v. Julow, 129 Mo. 163.

But a hearing and a trial under such circumstances, when the questions of fact upon which is based the right of recovery and liability are finally and conclusively fixed and determined against one party and in favor of the other, is not such a trial or hearing as is meant by "due process of law," or that which is guaranteed by the Federal Constitution.[1] The statute which closes a party's mouth "absolutely when in court is the same in effect as the law which deprives him of his day in court."[2]

"Due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity when in court to establish any fact which, according to the uses of the common law or the provisions of the Constitution, would be a protection to himself or property."[3]

If it is within the power of the Legislature to say that proof of an injury to a passenger shall be conclusive evidence of negligence against the carrier, it can as well say that the same proof shall be conclusive evidence of negligence on the part of the passenger.

2. Railroad companies are by this statute made liable to a passenger for damages caused by the passenger's own carelessness or want of care.

"Every railroad company," the statute says, shall be liable for all damages sustained by a person while being transported over its road, as a passenger, except in the following cases:

[1] R. Co. v. Chicago, 166 U. S. 226.
[2] Vega Steamship Co. v. Consolidated Elevator Co., 75 Minn. 308; R. Co. v. Minnesota, 134 U. S. 418.
[3] Wright v. Cradlebaugh, 3 Nev. 341, 349.

(1) Where the injury done arises from the "*criminal* negligence" of the person injured; or,

(2) Where the injury complained of shall be the violation of an express rule or regulation of said road actually brought to his or her notice.

This, we submit, gives a right of action against the railway company to a passenger for damages which may have resulted entirely from his own carelessness. And this is true even though the railway company exercised all possible care and caution, and did not in any way contribute to the injury or death. It matters not that the railway company does everything possible to protect and care for the passenger, yet if he loses sight of his own safety and is injured solely by his own negligent and careless act, he can recover under this statute all damages resulting therefrom, if he was not "*criminally*" negligent.

In other words, the railroad company is compelled to compensate him for his failure to exercise ordinary care and prudence for his own safety. He is not only relieved from the duty which rests upon all passengers at all times and under all circumstances to exercise ordinary care and prudence for their own safety, but this statute places a premium upon his failure to observe such care. In effect it says: "You may lay aside all ordinary care and caution; you may violate every rule and regulation of the railroad company that is not ac-

tually brought to your notice; you may be reckless, careless and foolhardy and injure yourself and recover all resulting damages from the railroad company, if you are not *criminally* negligent." The law-making power has no right to compel A to respond in damages to B for B's own carelessness. The statutes of every other State in the Union and of Congress may be searched in vain for a law permitting or authorizing such an outrage or encouraging such a wrong. It is contrary to our form of government, to the Constitution of the United States, and to every principle of right and justice upon which all constitutions are founded, and to which all laws, rules and regulations must conform.

This is not a question of contributory negligence. The statute says the carrier is liable even though the accident was caused entirely by the passenger's negligence.

In the old case of Dr. Bonham, 8 Coke, 118*a*, Lord COKE said:

"It appears in our books that in many cases the common law will control acts of Parliament, and adjudge them to be utterly void; for, when an act of Parliament is against *common right and reason*, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void."

The Supreme Court of Wisconsin says:

"No person, by his own transgression, can create a cause of action in his own favor against another for not interfering. That to which a man consents, or causes by his own action, cannot be considered an injury for

which he can recover damages. . . . *Volenti non fit injuria.*"[1]

Mr. FIELD, in his work on Damages, states the rule as follows:

"'It is the duty of a person to use *ordinary and reasonable care* and means to prevent an injury and the consequences of it. And he can only recover damages for such losses as could not, by such care and means, be avoided.' . . . It is the plaintiff's own fault if he fails to use reasonable efforts, care and diligence to protect himself from injury or loss, and where he fails so to do, he will not be permitted to say that the loss that might have been thus avoided, was caused by the wrong of the defendant; *for it is against the policy of the law as well as common principles of justice to permit a party to reap any advantage from his own negligence or from his own wrong.* . . . In such cases the maxim, *nullus commodum capere probit de injuria sua propria*, applies, and the rule is applicable in cases of contracts as well as in torts."[2]

No person can take advantage of his own wrong.[3]

If a person by his own negligent or wrongful act prevents a thing being done, he cannot recover damages therefor.[4]

REED, J., in speaking for the Court of Appeals of Colorado, in *R. Co. v. Outcalt*,[5] said:

"However it may be in England, it is clear that the contitutions of this and other States confer no power upon the legislature to enact laws in conflict with the principles of *natural justice and equity* of the common law upon which those constitutions were founded, and

[1] Richards v. City of Waupun, 59 Wis 45, 47; United States v. Wormer, 13 Wall. 25, 29.

[2] Field on Law of Damages, sec. 126; Weeks, Damnum Absque Injuria, sec. 121; Wharton's Legal Maxims, p. 139.

[3] Broom's Legal Maxims, 256.

[4] U. S. v. Peck, 102 U. S. 64, 65.

[5] 31 Pac. 177, 179.

which for centuries have been regarded as fundamental. The general grant of power to make 'reasonable and wholesome laws' is limited; it confers no power to enact a law in violation of the fundamental principles of the common law, as they existed at the time the constitutions were adopted."

In *Calder and wife v. Bull*, Judge CHASE said:

"I cannot subscribe to the omnipotence of a State Legislature or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the State. . . . The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man shall be compelled to do what the laws do not require, nor to refrain from acts which the law permits. There are acts which the Federal or State Legislature cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of the legislative power; as, to authorize manifest injustice by a positive law; or to take away that security for personal liberty or private property, for the protection whereof government was established."

"A few instances," he adds, "will suffice to explain what I mean: A law that punishes a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law; a law which destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A and gives it to B. It is against all reason and justice for a people to entrust a legislature with such powers, and, therefore, it cannot be presumed that they have done it. . . . The Legislature . . . cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent private contract; or the right of private property."[1]

It is true carriers are required in transporting passen-

[1] 3 Dallas, 386, 388.

gers to exercise all care that is practicable in the mode of conveyance used by them; but this does not relieve the passenger from exercising ordinary care for his own safety. He is still required to observe such care as is commensurate with the danger which he naturally and voluntarily encounters in traveling, and any law which attempts to relieve him of such care, or to compel another person to respond to him for his failure to use such care for his own safety, is unreasonable, unequal, unconstitutional and void.

Do parties stand equal before the law, or receive its equal protection, when A is required to respond to B for injuries caused by want of care on the part of B? Has the right of property any value, if the property of railroad companies can be taken from them and transferred to a passenger for damages sustained by him solely by reason of his failure to exercise ordinary care—the care that is required of all persons at all times? Certainly not. The purpose and object of all constitutions is to protect individuals and their property from statutes of the character of the one in question, and to insure to all persons the equal protection of the laws.

Is a law equal in its operation which allows a person to profit by his own negligent or wrongful act, and punishes one therefor who has exercised the greatest care and prudence? Does it bear with an impartial hand when it compels A to respond to B for the wrongful or negligent

act of B, or for the failure of the latter to exercise ordinary care for his own safety? Do they stand equal before the law when the innocent is punished and made to respond in damages to the guilty?

If the lawmaking power can compel a railroad company to compensate a passenger for damages received by reason of his failure to exercise ordinary care, it can compel the payment of such damages if the damages were caused by the criminal negligence of the passenger. If the power exists in either of these cases, the Legislature can go farther and compel a carrier to respond to a passenger for damages caused to the latter by his own *intentional* act. There is no difference in principle in these cases, the difference being only in degree.

3. By this statute the railway company is made liable, even though it may have exercised and observed all possible care, caution and foresight in transporting and caring for the passenger and performed every duty and obligation imposed upon it by law. No such liability is imposed upon any other person, company, or corporation, although many other persons, companies and corporations engage in the transportation of passengers, in the operation of railroads, and in other business equally as dangerous; but railroad companies are singled out from all the others and made liable by this statute. The operation of a railroad is as lawful and as beneficial to the public as farming, manufacturing, or dealing in

wares, yet the farmer, the manufacturer and the dealer are protected in their pursuits and permitted to possess and retain their property as long as they exercise proper care and perform their duties according to law, but railroad companies are not. The right of property, under the Constitution of the United States, is just as valid and sacred to railroad companies as to other persons. Why should a railroad company be mulcted in damages when it has been guilty of no wrong and has maintained and operated its road and train with every possible care? Such burdens or liabilities are not and have never been imposed upon other persons, companies, or corporations. On other persons liabilities have never been imposed unless for the failure to perform some duty or obligation, or for some wrong done, and the person at fault is the one that is compelled to respond in damages in such cases; but the statute in question is at war with those cases, and railroad companies, burdened with the liability imposed thereby, do not stand equal with other persons before the law.

The statute does not, expressly or by implication, impose or attempt to impose a duty of any kind or character; it does not prescribe any regulation or precaution as to the operation of railroads or the running of trains, nor does it require that any care or caution or vigilance be used by railroad companies in the transportation of passengers or in the operation of its railroad or trains. It

imposes a liability without the breach of any duty or the violation of any right; and therein lie some of the objections which we urge against its validity.

The Supreme Court of Oregon, in the case of *Sullivan v. Oregon Railway and Navigation Co.*,[1] discusses this question very fully in connection with the statutes of the different States by which liabilities are imposed upon railroad companies, and it shows clearly that when a liability is thus imposed without the violation of a duty the statute has always been declared void and unconstitutional. The court said:

"As the defendant has the lawful right in a lawful way to run its trains, . . . there must be some violation of a duty imposed by law, or some act of negligence on its part. And it would follow, unless the act imposes some duty, the violation of which renders the defendant liable, it would be open to the objection that it subjects the defendant and its business to a liability where no wrong has been committed, or duty unperformed, thereby depriving it of its property and the equal protection of the law afforded to others."

Chief Justice BEASLEY, in speaking for the Supreme Court of New Jersey on this question, said:

"'No man is, in law, an insurer that the acts which he does, such acts being lawful and done with care, shall not injuriously affect others. . . . The common rule, quite institutional in its character, is that, in order to sustain an action for a tort, the damages complained of must have come from a wrongful act. . . . Everywhere, in all the branches of the law, the general principle, that blame must be imputable as a ground of responsibility for damages proceeding from a lawful act,

[1] 19 Or. 319 321.

is apparent.' A passenger is injured by the breaking of an axle of a public conveyanee; the carrier is not liable, unless negligence can be shown. A man's guest is hurt by the falling of a chandelier; a suit will not lie against the host, without proof that he knew, or ought to have known, of the existence of the danger. If the steam engine which did the mischief in the present case had been in use in driving a train of cars on a railroad, and had, in that situation, exploded, and had inflicted injuries on travelers or bystanders, it could not have been pretended that such damage was actionable, in the absence of the element of negligence or unskillfulness."[1]

Mr. ADDISON very correctly states the rule as follows:

"A man may, however, sustain grievous damages at the hands of another; and yet, if it be the result of a lawful act, done in a lawful manner, without any carelessness or negligence, there is no legal injury, and no tort giving rise to an action for damages."[2]

The Supreme Court of Kansas says:

"Actions are founded only upon wrongs. A cause of action can exist only where some right has been violated. A cause of action founded upon negligence can exist only where the defendant owes some duty to the plaintiff, and wrongfully fails to perform that duty."[3]

The Supreme Court of Minnesota says:

"Actionable negligence is the failure to discharge a legal duty to the person injured. If there is no duty, there is no negligence."[4]

"It is the *fundamental* principle of law," says the Supreme Court of New York, "that the absolute right of every man to use his own property as he pleases for all purposes to which such property is usually applied, provided he exercises proper care and skill to prevent any

[1] Marshall v. Welwood, 38 N. J. L. 339-345.
Ulshowski v. Hill, 61 N. J. L. 375.
[2] Addison on Torts, Vol. 1, p. 3.
[3] A. & N. R. Co. v. Flinn, 24 Kan. 627, 639.
C. C. C. & St. L. R. Co. v. Ballentine, 84 Fed. Rep. 937.
[4] Akers v. Railway Co., 58 Minn. 544.

unnecessary injury to others, is *unlimited and unqualified* up to the point where the particular use becomes a nuisance."[1]

A case directly in point is that of *D. & R. G. R. R. Co. v. Outcalt*,[2] in which a recovery was sought under a statute of Colorado, which provided that railroad companies should be absolutely liable for all stock killed by their trains, without regard to the question of negligence or care on the part of the railroad companies. That statute was similar in principle to the one in question in the case at bar. The court, in holding it unconstitutional and void said:

"It [the statute] declares that the corporation shall be liable and make payment, for damages inflicted by inevitable accident, which no care, skill, diligence or foresight could prevent, and precludes the corporation from exculpating itself or making any defense whatever. In this it is discriminating, special and void. Natural persons are allowed to defend and exonerate themselves, show that the misfortune was inevitable, and the accident and damages unavoidable. Any statute that forecloses a defendant, and precludes all defense and denies the 'day in court' is and must be unconstitutional and void."

In the case of *O. & M. R. Co. v. Lackey*,[3] decided by the Supreme Court of Illinois, was involved a statute which provided that "every railroad company running cars within this State shall be liable for all the expense of the coroner and his inquest, and the burial of all persons who may die on the cars, or who may be killed by

[1] Fisher v. Clark, 41 Barb. 329.
[2] 31 Pac Rep. 177, 180.
[3] 78 Ill. 55, 56.

collision, or other accident occurring to such cars, or otherwise."

The court, in holding the statute unconstitutional, said:

"On what principle is it that railroad corporations, without any fault on their part, shall be compelled to pay charges which, in other cases, are borne by the property of the deceased, or, in default thereof, by the county in which the accident occurred? An examination of the section will show that no default, or negligence of any kind, need be established against the railroad company, but they are mulcted in heavy damages if, notwithstanding all their care and caution, a death should occur on one of their cars, no matter how caused, even if by the party's own hand. Running of trains by these corporations is lawful, and of great public benefit. It is not claimed that the liability attaches for a violation of any law, the omission of any duty or the want of proper care and skill in running their trains. . . . As argued by the counsel for appellant, the law attempts to place what is properly a public burden upon these corporations, which should be borne by all alike, and discharged out of public funds raised by equal and uniform taxation. . . . The views presented by appellant satisfy us the law in question cannot be sustained as a constitutional enactment."

In the nitro-glycerine cases[1] Mr. Justice FIELD in speaking for this court, said:

"No case or principle can be found, or if found, can be maintained, subjecting an individual to liability for an act done without fault on his part."

And in the case of *Harvey v. Dunlap*,[2] Mr. Chief Justice NELSON used the following language:

"All the cases concede that an injury arising from in-

[1] 15 Wall. 524, 539.

[2] Hill & Denio's Rep. 194.

evitable accident, or which in law and reason is the same thing, from an act which the ordinary care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility."

In the case of *Lozee v. Buchanan*,[1] Mr. Chief Justice SHAW said:

"We think as a result of all the authorities that the rule is that the plaintiff must come prepared with evidence to show that the *intention* was unlawful, or that the defendant was in *fault;* for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be held liable. If, in the prevention of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom."

The Supreme Court of Massachusetts, in the case of *Brown v. Kendall*,[2] used the following language:

"If in the prosecution of a lawful act a casualty purely accidental arises no action can be supported for any injury arising therefrom. . . . To make an accident or casualty, or as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency and in the circumstances in which he was placed."

The principle for which we contend is stated by this court in the case of *Gulf, C. & S. F. R. Co. v. Ellis*.[3] In that case was involved the constitutionality of a statute of Texas which provided that "railroad companies failing to pay claims less than fifty dollars for labor, damages, overcharges on freight or for stock killed, within

[1] 51 N. Y. 489.
[2] 6 Cush. 292, 296.
[3] 165 U. S. 150, 152.

thirty days after presentation thereof, shall be liable for attorney's fees not exceeding ten dollars." This court held the statute unconstitutional and void, and, in speaking through Mr. Justice BREWER, said:

"The single question in this case is the constitutionality of the act allowing attorney fees. The contention is that it operates to deprive the railroad companies of property without due process of law, and denies to them the equal protection of the law, in that it singles them out of all citizens and corporations, and requires them to pay in certain cases attorney fees to the parties successfully suing them, while it gives to them no like or corresponding benefit. Only against railroad companies is such exaction made and only in certain cases. . . . The Supreme Court of the State considered the statute as a whole, and held it valid, and as such it is presented to us for consideration. Considered as such, it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors, and punishes them, when, for like delinquencies, it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts, as other litigants, under like conditions, and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fee of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong. They do not recover any if right; while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law."

The Supreme Court of Nebraska has said:

"The rights of every individual must stand or fall by the same *general* law that governs every member of the body politic in the land, under similar circumstances, and therefore a partial law which proposes to affect or destroy the rights of particular persons, or a *particular class* of persons, is not the law of the land."[1]

Defenses which are valid and absolute to other persons and corporations are, by this statute, taken from railroad companies, so that they cannot enter the courts with the same rights and privileges as other litigants. In cases against other persons or corporations the defense of contributory negligence, or that the damages complained of were caused entirely and solely by the negligence of the injured person, is good in every civilized country.

By this statute, as construed by the trial court and Supreme Court of the State, a railroad company is absolutely liable for all injuries received by its passengers while on its trains. It would be liable for injuries caused by lightning, or a missile hurled into a car by a person outside on a public highway.

The language of the Supreme Court of Tennessee is especially applicable at this time:

"Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community who made the law, by another."[2]

[1] A. & N. R. Co. v. Baty, 6 Neb. 37.

[2] Vanzant v. Waddel, 2 Yerg. 260, 270.

It must be remembered that we are not discussing or considering the right of a State to control or regulate railroads or railroad companies. An altogether different question is presented; that is, the power of the State to take the property of one person and transfer it to another. This power is claimed to exist although the person from whom the property is taken has been guilty of no wrong, and has observed in every way his duty to the public as well as to the person to whom the property is given.

"Due process of law" does not mean a law which punishes one for doing that which the sovereign power has legally authorized to de done, or a law which imposes upon A a liability to B for a wrongful act or neglect of B.

In referring to this question, the Supreme Court of Nebraska has said:

"This common law right of property is secured by our constitution. It declares that 'no person shall be deprived of life, liberty or property without due process of law.' The terms 'due process of law' and 'the law of the land'—one or the other of which is found in all constitutions of the States—are said to mean the same thing; and it is quite clear that they are indifferently used in constitutions for the same purpose. They are said to refer to a pre-existing rule of conduct, and designed to exclude arbitrary power from every branch of the government. (*State v. Doherty*, 60 Me. 509. *Norman v. Heist*, 5 W. & S. 171. *The State v. Simon*, 2 Spears, 767.) Hence, these terms do not mean merely a legislative enactment; for 'if they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be taken

imprisoned, disseized of his freehold, liberties and privileges; be outlawed, exiled and destroyed; *and be deprived of his property*, his liberty and his life, without crime? Yet all this he may suffer if an act of the assembly, simply denouncing these penalties upon particular persons, or a particular class of persons, be in itself the law of the land within the sense of the constitution.' (*Hoke v. Henderson*, 2 Dev. 15.) Webster interprets these terms to mean 'that every citizen shall hold life, liberty, property and immunities under the protection of the *general rules* which govern society. Everything which may pass under the form of an enactment is not therefore to be considered as the law of the land'; and he says, if this were so, 'acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in every possible form would be the law of the land. There would be no general permanent law for the courts to administer, or even to live under. The administration of justice would be an empty form — an idle ceremony. Judges would sit to execute legislative judgments and decrees, and not to declare the law, or administer the justice of the country.'"[1]

The Legislature of Utah passed an act making railroad companies liable for the death of all live stock killed by its cars. In holding the statute unconstitutional and void as not due process of law, the Supreme Court said:

"But it yet remains for us to define 'due process of law,' as understood in the common law of England, and by inheritance the common law of America. Many definitions have been attempted, but it is believed that they all come to this citation, which means that a party shall have his day in court — trial, which means the right of each party, plaintiff and defendant, to introduce evidence to establish his right to recover on the one hand, and to establish his defense upon the part of the other, after

[1] A. & N. R. Co. v. Baty, 6 Neb. 37, 42.

which comes judgment. Any judgment which is rendered without these modes of procedure, or in disregard of them, is not 'due process of law.' Any other procedure condemns before it hears, does not proceed upon inquiry, but renders judgment before trial. Tested by the light of these suggestions, how stands it with the statute in this case? The defendant company, under a charter granted by the Legislature, of which the statute mentioned is no part, has purchased its right-of-way over the lands of the territory, established its track, and put thereon its engines and cars, for the purpose of carrying out the original design of the Legislature in granting its charter. It will then be seen that the defendant is in the exercise of a lawful right, in a lawful way. Now, comes the statute and says to the defendant: 'Notwithstanding all this, when you kill an animal you shall pay its value to the owner.' That is, although you are in the exercise of a perfectly lawful pursuit, and without any fault or negligence, proof of killing and value shall be conclusive evidence of wrong upon your part, and you shall not be allowed to aver or prove the contrary. If this be due process of law, then all the Legislature has to do, to take the property of A and give it to B, is to enact that when A sues B certain admitted facts shall establish conclusively A's right to recover, and B shall not be heard to introduce evidence to the contrary. No matter how careful and cautious an engineer may be in the management of his train; no matter how steep the grade may be that his train is going down; no matter how many hundred lives are in his care behind his engine—yet all must be sacrificed to save a horse or cow, or the company is to pay the damages. Hardly."[1]

Similar statutes were passed by the Legislatures of Colorado, Idaho, Montana and Washington,[2] but they have *all* been held by the Supreme Courts as not due process of law and void.

[1] Jensen v. R. Co, 6 Utah, 253.
[2] Cattrell v. R. Co., 2 Idaho, 540; Bielenberg v. R. Co., 8 Mont. 271; R. Co. v. Outcalt, 31 Pac. Rep. 177; Oregon Ry. & Nav. Co. v. Smally, 1 Wash. St. 206.

In *Zeigler v. R. Co.*,[1] a statute was under consideration which provided that railroad corporations should be liable for the value of all live stock killed by their trains, without reference to the skill or diligence with which the train was operated. The Supreme Court of Alabama said:

"This statute declares that railroad corporations shall be liable, and make compensation to the owner, for all damages to live stock caused by their locomotives or trains, without any reference to the skill or diligence with which the train is operated. It results that no matter what care, prudence, watchfulness and skilled knowledge those having charge of a train may employ, still, if damage to live stock be caused by the train, the railroad corporation is responsible, unless the person owning such live stock contribute to the injury; but permitting live stock to run at large shall not be considered as contributing to such injury. (Section 3 of the act.) It is obvious that under this statute the highest diligence could not avoid frequent injuries to live stock, for which the corporation would be held accountable, if the act be constitutional. Two facts, and two only, are required to be shown to authorize a recovery: Ownership of the property, and injury by the locomotive or cars of the railroad. The graver inquiry of capacity and diligence in the conduct of the train, the law assumes to determine or dispense with. Is this 'due process of law,' under section 7 of the declaration of rights? . . .

"The clause itself means that such legislative acts, as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it rested, according to the course, mode and usages of the common law as derived from our forefathers, are not effectually 'laws of the land,' for those purposes.

[1] Zeigler v. R. Co., 58 Ala. 594, 596.

"'Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. . . . . They were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' (Cooley Cons. Lim. 355.)

. . . . . .

"We have said above that the statute under discussion dispenses with all proof of the most material element of the wrong it seeks to redress. It declares that the railroad corporation shall make reparation for any injury inflicted in the authorized prosecution of its lawful business, without a semblance of fault, negligence, or want of skill in its employes; an injury, which no human prudence or foresight could prevent; and yet, the statute will not allow the railroad to exculpate itself, by proof of the highest qualifications and most watchful vigilance. This falls short of due process of law. We have heretofore declared a rule which exacts from railroad corporations a high degree of skill and diligence, to prevent injury to persons and property. (See *Tanner v. Louisville & Nashville R. R. Co.; Sav. & Memp. R. R. Co. v. Shearer*, and *S. & N. R. R. Co. v. Sullivan*, at the present term.) We have no wish to modify that rule. But when these very useful corporations conform to this strict rule of diligence, we can perceive no reason, in law or morals, for holding them to a stricter measure of accountability for inevitable misfortunes, than would be exacted from natural persons for injuries which result from unavoidable accident; or accidents which no human prudence can foresee or avert."

How could a proposition be clearer than the one just quoted? Under the statute in question railroad companies are not allowed a trial, or an examination of the facts or law on the question of liability. The liability is made absolute and conclusive as to all passengers who

are injured while being transported over the road, except those who are injured by their own *criminal* negligence, or by their violation of an express rule or regulation actually brought to their notice. All other questions relating to the liability or the right to recover are absolutely adjudged and finally determined against railroad companies. If the Legislature has the power to deprive a railroad company of the right to defeat such an action by showing that it was not negligent, or that the injury to the passenger was sustained by his own wrongful act, or by his failure to exercise ordinary care, the same power would enable it to say that the defendant could not defeat the action by showing that the injury was caused by the *criminal* negligence of the passenger, or by his violation of an express rule or regulation actually brought to his notice or by his intentional act. The extent to which the power is exercised does not determine the question of right or the validity of the act.

As was said by Mr. Justice BRADLEY, in *Boyd v. U. S.*:[1]

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it

[1] 116 U. S. 616, 635; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150.

consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

It must be remembered that the statutes of Idaho, Montana, Utah, Washington, Colorado and Illinois, all of which have been held unconstitutional, as stated above, were not as vicious as the statute of 1867, in question in this case. Neither of the first mentioned statutes deprive the defendant of the defense of contributory negligence, as the latter one does to a very great extent.

Especially applicable at this time is the following language of this court:[1]

"The law applicable to common carriers is one of great vigor. Though to the extent to which it has been carried, and in the cases to which it has been applied we admit its necessity and its policy, we do not think it ought to be carried further, or applied to new cases. We think it has not been applied to living men, and that it ought not to be applied to them."

It may be contended that the same reason exists for making railroad companies absolutely liable for damages to passengers as exists for holding them liable for the loss of goods or freight. This contention may seem plausible at first, but when considered in the light of the reasons for imposing the liability for inanimate objects, its unsoundness as applied to passengers is apparent.

[1] Boyce v. Anderson, 2 Pet. 154. 155.

The rule with reference to inanimate objects was first stated and the carrier held liable as an insurer of freight delivered to it for transportation, by Lord HOLT, in the case of *Coggs v. Bernard*, in 1703. In stating the rule, he said:

"As to the fifth sort of bailment, viz., a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts: either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier. . . . The law charges this person thus intrusted to carry goods, against all events but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point."[1]

The next case in which the reason for the rule was stated was that of *Riley et al. v. Horne*,[2] decided in 1828, by the Court of Common Pleas. In that case BEST, C. J., in speaking for the court, said:

"When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of

[1] 2 Ld. Raym. 917, 918. | [2] 5 Bing. 220.

their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes or loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves."

All subsequent cases in which this liability has been imposed have been based on these two cases, and no reason for imposing it, other than those quoted above, has ever been given. It is, therefore, clear that the reason for imposing this liability was, that as the goods or freight was delivered into the possession of the carrier and was no longer under the eye of the owner, and that the only person who could know of the manner in which the goods were damaged or destroyed would be the servants of the carrier, and they, "knowing that they could not be contradicted, would" perjure themselves and testify falsely in order to protect their master—the carrier. This court would not hesitate to declare unconstitutional a statute imposing or creating a liability having for its support the reasons stated in the cases just quoted from.

This liability has never been extended to passengers, and were it not so well fixed, it would, in this age of advanced civilization and enlightenment, be denied to goods and other inanimate objects. This is clear from the following language, used in 1869 by the same court that established the rule imposing the liability in 1703:

"The law of England has, from the earliest times, established a broad distinction between the liabilities of common carriers of goods and of passengers. Indeed, the responsibility of the carrier to redeliver the goods in a sound state can attach only in the case of goods. This responsibility (like the analogous one of innkeepers) has been so long fixed, and is so universally known, that carriers of goods undertake to carry on contracts well understood to comprehend this implied liability. If it had not been the custom of the realm or the common law declared long ago that carriers of goods should be so liable, it would not have been competent for the judges in the present day to have imported such a liability into their contracts on reasons of supposed convenience. But this is, as it seems to us, what we are asked by the plaintiffs to do in the case of carriers of passengers." [1]

But, as we have already stated, the relation of a carrier to a carload of freight and to a passenger is altogether different, and the transportation of the two is not and cannot be similar in any way, hence the liability must necessarily be different.

Passengers must be allowed some freedom — they cannot be stored away or taken possession of like freight or inanimate objects.

"Consequently," says Mr. Hutchinson, "the policy of the law, as it is called, which induced the judges in early times to establish the rule of the extraordinary responsibility of common carriers as to the goods entrusted to them, . . . was never applicable to carriers of passengers." [2]

In speaking for this court on this question Chief Justice MARSHALL said: [3]

[1] Readhead v. The Midland Railway Company, 4 L. R. Q. B. 380.

[2] Hutchinson on Carriers, sec. 497.

[3] Boyce v. Anderson, 2 Pet. 150, 154.

"There being no special contract between the parties in this case, the principal question arises on the opinion expressed by the court, 'that the doctrine of common carriers does not apply to the case of carrying intelligent beings, such as negroes.'

"That doctrine is, that the carrier is responsible for every loss which is not produced by inevitable accident. It has been pressed beyond the general principles which govern the law of bailment by considerations of policy. Can a sound distinction be taken between a human being in whose person another has an interest, and inanimate property?

"A slave has volition, and has feelings which cannot be entirely disregarded. These properties cannot be overlooked in conveying him from place to place. He cannot be stowed away as a common package. Not only does humanity forbid this proceeding, but it might endanger his life or health. Consequently, this rigorous mode of proceeding cannot safely be adopted, unless stipulated for by special contract. Being left at liberty, he may escape. The carrier has not and cannot have the same absolute control over him that he has over inanimate matter. In the nature of things, and in his character, he resembles a passenger, not a package of goods. It would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods.

"There are no slaves in England, but there are persons in whose service another has a temporary interest. We believe that the responsibility of a carrier for injury which such person may sustain has never been placed on the same principle with his responsibility for a bale of goods. He is undoubtedly answerable for any injury sustained in consequence of his negligence or want of skill; but we have never understood that he is responsible further."

But carriers have never been held liable for damages to freight that were caused by the act, whether negligent or otherwise, of the shipper. In order to place upon the

carrier the common law liability, the carrier must have the unlimited control of the property, which cannot be obtained in the transportation of passengers, as they are endowed with intelligence and must necessarily be allowed some freedom during transportation.

The reason why the liability in both cases is not the same is stated very clearly by Mr. Hutchinson, as follows:

"Public carriers may not only be carriers of goods, but carriers of persons also, and while carrying the goods, may at the same time carry their owners. As to the one, in such a case, the carrier would be a passenger carrier, and as to the other, a common carrier of goods; and although he might carry them both upon the same conveyance, and at the same time, the nature of the responsibility which he would incur as to them would be very different; and this difference in the kind of responsibility which the law imposes upon him exists even between the passenger and his baggage, as to which, as we have seen, the carrier becomes responsible as a common carrier of goods, although its carriage is merely incidental to the carriage of the passenger. Of the goods he must have, in order to impose upon him the responsibility of a common carrier, *the absolute and unlimited control*, and the law supposes that their safety, aside from the acts of God and the public enemy, against which it protects him, depends entirely upon the care and faithfulness with which he discharges his trust. But the passenger being endowed with intelligence and the power of locomotion, which enable him, in a great measure, to foresee and avoid danger, the exercise of at least ordinary prudence is required on his part to escape it, and if, by his failure to exercise these faculties for his own preservation, a misfortune befall him, though the carrier may have been in fault, it will be attributed to his own carelessness and inattention,

and the responsibility will not be thrown upon the carrier."[1]

The liability of an individual carrier as an insurer of dead freight is the same as that of corporate carriers. There is no good reason why the liability for injuries to passengers should be different in the case of an individual from that of a railway carrier.

In the case of *Hart v. C. & N. W. R. Co.*,[2] the defendant contended that it was not responsible for the loss of the freight if it was caused by the act of the owner, or by his failure to exercise ordinary care. The court, in upholding this contention, and in deciding that the carrier was not responsible for any damages caused by the act of the owner, used the following language:

"The question presented by this assignment of error, then, is, whether a common carrier is responsible for the injury or destruction of property while it is in the course of transportation, when the injury is caused by some act of the owner, but which is unattended with any negligence on the part of the owner.

"The carrier is held to be an insurer of the safety of the property while he has it in his possession as a carrier. His undertaking for the care and safety of the property arises by the implication of law out of the contract for its carriage. The rule which holds him to be an insurer of the property is founded upon considerations of public policy. The reason of the rule is that, as the carrier ordinarily has the absolute possession and control of the property, while it is in course of shipment, he has the most tempting opportunities for embezzlement or for fraudulent collusion with others. Therefore, if it is lost or destroyed while in his custody, the policy of the law imposes the loss upon him. (*Coggs v. Bernard*, 2 Ld.

[1] Hutchinson on Carriers, sec. 495, p. 398.

[2] 69 Iowa, 485, 487.

Raym. 909; *Forward v. Pittard*, 1 Durn. & E. 27; *Riley v. Horne*, 5 Bing. 217; *Thomas v. Railway Co.*, 10 Metc. 472; *Roberts v. Turner*, 12 Johns. 232; *Moses v. Railway Co.*, 24 N. H. 71; *Rixford v. Smith*, 52 id. 355.) His undertaking for the safety of the property, however, is not absolute. He has never been held to be an insurer against injuries occasioned by the act of God, or the public enemy, and there is no reason why he should be; and it is equally clear, we think, that there is no consideration of policy which demands that he should be held to account to the owner for an injury which is occasioned by the owner's own act; and whether the act of the owner by which the injury was caused amounted to negligence is immaterial also. If the immediate cause of the loss was the act of the owner, as between the parties, absolute justice demands that the loss should fall upon him, rather than upon the one who has been guilty of no wrong; and it can make no difference that the act cannot be said to be either wrongful or negligent. If, then, the fire which occasioned the loss in question was ignited by the lantern which plaintiff's servant, by his direction, took into the car, and which, at that time, was in the exclusive control and care of the servant, defendant is not liable, and the question whether the servant handled it carefully or otherwise is not material. This view is abundantly sustained by the authorities. (See Hutch. Carr., § 216, and cases cited in the note; also Lawson Carr., §§ 19, 23.)"

It may also be contended that the act of 1867 should be upheld on the same ground that statutes making railway companies liable for damages caused by fire set out by their engines are held valid, but the reasons and grounds upon which the statutes are founded, are entirely different.

In pointing out this difference, the Supreme Court of Colorado said:

"The statute making every railroad company unconditionally liable in case it shall kill or damage a domestic animal by running its trains over or against such animal stands on a footing quite different from the fire statute. Fire is a dangerous element, and according to the ancient common law the rule was, as stated in the De Busk case, that 'a person who makes a fire must see that it does no harm, and must answer for the damage, if it does any.'"[1]

The Supreme Court of Missouri, in the Mathews[2] case, said:

"It ought not to excite surprise among a people, the great body of whose laws had their origin in England, that those who set out fires which destroy the property of others should be held absolutely responsible for them. Such was the ancient common law before any statutes were enacted. 'If my fire, by misfortune burns the goods of another man, he shall have his action on the case against me. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods and also my neighbor's house, he shall have his action on the case against me. So if the fire is caused by a servant, or a guest, or any person who entered the house with my consent; but otherwise if it is caused by a stranger who entered the house against my will.' Rolle's Abridgment, Action on the Case, 'B'; *tit.*, 'Fire.'"

"At common law," says the Supreme Court of the United States in the Mathews case, "every man appears to have been obliged, by the custom of the realm, to keep his fire safe so that it should not injure his neighbor; and to have been liable to an action if a fire, lighted in his own house, or upon his land, by the act of himself, or of his servants or guests, burned the house or property of his neighbor, unless its spreading to his neighbor's property was caused by a violent tempest, or

[1] Wadsworth v. U. P. Ry. Co., 18 Colo., 600, 610.

[2] 121 Mo., 298, 317.

other inevitable accident which he could not have foreseen."[1]

The Supreme Court of Arkansas, in referring to this same question, said:

"In Massachusetts, by statute, railroad companies are made absolutely liable for injuries by fire communicated from their engines; but in compensation are given an insurable interest in any buildings along the route. The courts have sustained this law, but the nature of it is peculiar and exceptional, and the language too clear to admit of doubt."[2]

Again: In the fire cases, the fire is set out and the damage is caused by the direct act of the company, in throwing, or permitting the fire to escape, from the locomotive; but in the case at bar the death of Zernecke was caused, not by any act of the plaintiff in error, but by the malicious and felonious act of a third party.

Suppose Davis, instead of derailing the train, had set fire on the right-of-way of the company without its consent or knowledge; and that such fire had escaped, without fault on the part of the company, to an adjoining field, causing damage to the owner thereof: could the company have been held for such damage? Clearly not. Or, to state a case more like the one at bar, suppose a man, for the purpose of committing murder or robbery, should set fire to a building of another, causing it to be consumed, and that the fire so started, without the fault of the owner of the building, should be commu-

[1] St. Louis & San Francisco Ry. Co. v. Mathews, 165 U. S. 5.

[2] Little Rock & Ft. Scott Ry. Co. v. Payne, 33 Ark. 816, 820.

nicated to and destroy another building: would any statute, which made the owner of the building first feloniously set on fire liable for damages to the other building, be valid?

We respectfully submit that the statute in question is unconstitutional and that the judgment of the Supreme Court of the State of Nebraska should be reversed.

W. F. EVANS,
Attorney for Plaintiff in Error.

M. A. LOW,
Of Counsel.

No. 273.

APR 16 1901
JAMES H. McKENNEY,
Clerk

In the Supreme Court of the United States.

Br. of Harvey for D. E.

October Term, 1900.

No. 273.

Filed April 16, 1901.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
WEBSTER EATON, ADMINISTRATOR OF THE ESTATE OF JOHN R. MATHEWS, DECEASED,
Defendant in Error.

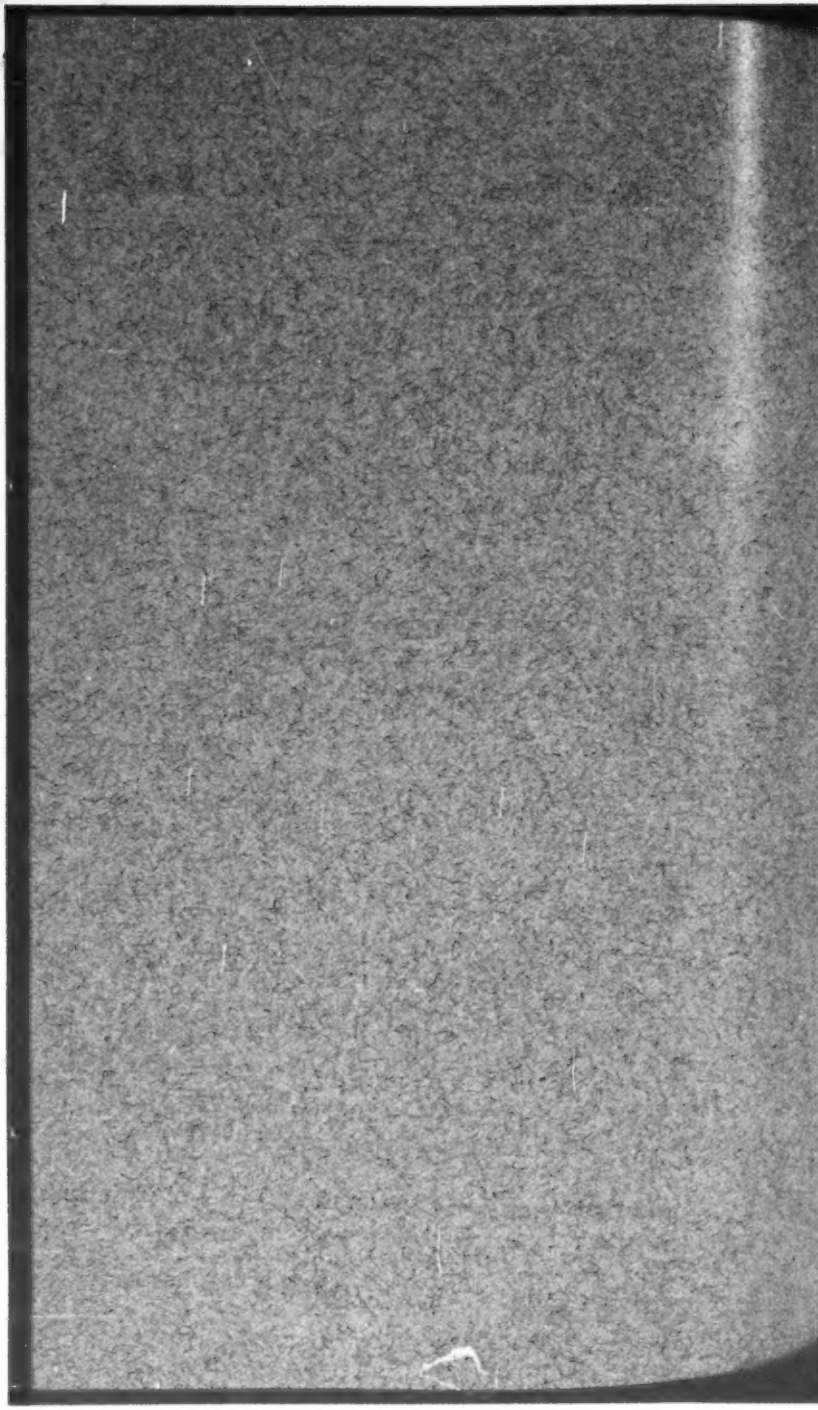
ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

Argument and Brief of Defendant in Error.

THOMAS C. MUNGER and
JOHN M. STEWART,
Attorneys for Defendant in Error.

A. E. HARVEY,
Of Counsel.

BEDELL PRINTING CO., LINCOLN, NEB.



11321

In the Supreme Court of the United States.

October Term, 1900.

No. 273.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
WEBSTER EATON, ADMINISTRATOR OF THE ESTATE OF JOHN R. MATHEWS, DECEASED,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

Argument and Brief of Defendant in Error.

THOMAS C. MUNGER and
JOHN M. STEWART,
Attorneys for Defendant in Error.

A. E. HARVEY,
Of Counsel.

STATEMENT.

On August 9, 1894, a train on the railroad of plaintiff in error in which John R. Mathews was a passenger, was wrecked near Lincoln, Nebraska, causing his instant death.

The defendant in error, as administrator, brought this action in the district court of Thayer County, Nebraska, to recover from the railroad company damages resulting to the next of kin, by reason of such death. The wreck was caused by the train being derailed while running at a high rate of speed across a bridge about twenty feet high. Trial was had resulting in a judgment on November 18, 1896, in favor of defendant in error, for $1,500.00, from which judgment the company prosecuted proceedings in error to the supreme court of Nebraska. On March 7, 1900, the judgment of the district court was affirmed by such supreme court. The case now comes to this court from the supreme court of Nebraska on a writ of error to reverse its said judgment of affirmance.

Section 3, article 1, chap. 72 of the Compiled Statutes of Nebraska, provides as follows:

> "Every Railroad Company as aforesaid shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road, actually brought to his or her notice."

The supreme court of Nebraska has repeatedly construed its term "criminal negligence" in this statute to mean "gross negligence."

C. B. & Q. R. R. vs. Hague, 48 Nebr., 97.

C. B. & Q. R. R. vs. Landauer, 39 Nebr., 804.

U. P. R. R. vs. Porter, 38 Nebr., 226.

M. P. R. R. vs. Baier, 37 Nebr., 254.

F. E. & M. V. R. R. vs. French, 48 Nebr., 638.

C. B. & Q. R. R. vs. Wolfe, 85 N. W. Rep., ——

Section 110, chapter 16, of the same statutes provides:

> "In case any passenger on any railroad shall be injured while on the platform of a car while in motion, or in any baggage, wood or freight car in violation of the printed regulations of the company posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the injury, provided said company furnished room inside its passenger cars sufficient for the accommodation of its passengers."

The foregoing statutes were enacted in the year 1867, and long before the plaintiff in error was incorporated or owned or operated any railroad in the state.

Upon the trial in the district court the railroad company offered evidence tending to show that the derailment of the train in question was not caused by any negligence on its part, but by the act of a third party who purposely wrecked the train. This evidence on objection was excluded, the court holding that under the Nebraska statute the question as to whether the railroad company was negligent was immaterial. No evidence was given or offered tending to show that the deceased was guilty of any contributory negligence. The court instructed the jury in accordance with the provisions of the foregoing statute.

BRIEF AND ARGUMENT.

It is contended that the statute of Nebraska whereby railroad companies are made absolutely liable for all injuries sustained by passengers while being transported, except such as are occasioned by the negligence of the passenger, is unconstitutional in that it deprives such railroad company of its property without due process of law, and deprives it

of the equal protection of the laws. *This was the only constitutional question raised before the Nebraska supreme court. (Last assignment of error, page 6 of record.)*

The statute did not deprive the plaintiff in error of its property without due process of law.

The statute has been assailed by the railroad company as being unjust and unreasonable, and imposing on it a liability for injuries occuring without any fault on its part, thereby depriving it of its property without due process of law. It is true the statute extends the rule of absolute responsibility for the safe carriage of persons that heretofore obtained at common law, for the carriage of property, but such rule, we contend, is based on sound reason, is within the police power of the state, and is in accord with that principle of an advanced civilization which holds sacred human life and protection of the person.

The statute has been upheld in a large number of cases by the supreme court of Nebraska. See

Chollette vs. Railroad Company, 26 Nebr., 159.
Railroad Company vs. Chollette, 33 Nebr., 143.
Railway Company vs. Baier, 37 Nebr., 235.
Railway Company vs. Porter, 38 Nebr,, 226.
Railroad Company, vs. Hague, 48 Nebr., 97.
Railroad Company vs. Landauer, 39 Nebr., 803.
Railway Company vs. Chollette, 41 Nebr., 578.
Railroad Company vs. Hedge, 44 Nebr., 448.
Railroad Company vs. French, 48 Nebr., 638.
Railroad Company vs. Young, 58 Nebr., 678.
Railroad Company vs. Zernecke, 59 Nebr., 689.
Railroad Company vs. Wolfe, 85 N. W. Rep., decided March 21, 1901.

In the cases of Railway Co. vs. Porter, Railway Company vs. Baier, and in Railroad Co. vs. Chollette, 41 Nebr., 578, the constitutionality of the statute was directly drawn in question. In was contended in those cases that the statute violated the provisions of the State and United States constitutions in that it deprived the railroad company of its property without due process of law and denied them the equal protection of the law. In each of those cases the statute was upheld on both points as constitutional.

In the case of Chicago etc., R. R. Co., vs. Young, 58 Nebr., 678; 79 N. W. Rep. 556, the supreme court of Nebraska in passing upon the validity of the statute says:

> "The act of June 22, 1867, making railroad companies liable in the absence of negligence for injuries to passengers on their trains is justifiable legislation under the *police power* of the state. It aims to promote safety in travel, and neither deprives such companies of their property without due process of law, nor denies them the equal protection of the laws."

To show the necessity of such an enactment, we need but to refer to the common law rule and the reasons which caused its adoption

In Hutchinson on Carriers, Sec. 495, it is said:

> "Public carriers may not only be carriers of goods, but carriers of persons also, and while carrying the goods, may at the same time carry their owners. As to the one in such a case, the carrier would be a passenger carrier, and as to the other a common carrier of goods; and although he might carry them both on the same conveyance, and at the same time, the nature of the responsibility which he would incur as to them would be very different; and this difference in the kind of rseponsibility which the law imposes upon him exists even between the passenger and his baggage, as to which, as have seen, the carrier becomes responsible as a common

carrier of goods, although its carriage is merely incidental to the carriage of the passenger. Of the goods, he must have, in order to impose upon him the responsibility of a common corrier, the absolute and unlimited control, and the law supposes that their safety, aside from the acts of God and the public enemy, against which it protects him, depends entirely upon the care and faithfulness with which he discharges his trust. But the passenger being endowed with intelligence, and the power of locomotion, which enable him in a great measure to foresee and avoid danger, the exercise of at least ordinary prudence is required on his part to escape it, and if by failure to exercise these facilities for his own preservation, a misfortune befall him, though the carrier may have been in fault, it will be attributed to his own carelessness and inattention, and the responsibility will not be thrown upon the carrier."

The proposition that carriers ought not to be liable for injuries to passengers because the latter are presumed to be able to foresee and avoid danger, might have had some reason to support it in the days when travel was by the slow going stage coach; but to apply it to the case of passengers traveling at the rate of fifty or sixty miles per hour on a railroad in the present day, would be ridiculous in the extreme. What chance had the passengers in the ill-fated train in question to foresee and avoid danger? One moment they sat in supposed safety, and the next moment were crushed and dying. No opportunity was given them for the exercise of foresight and care. Under such conditions, what reason is there in a rule which says to the Rock Island Railroad Company: "You are liable for the baggage destroyed in this wreck but not for the injuries sustained by such passengers to their persons."

The supreme court of Nebraska in its latest decision upon this question, C. B. & Q. R. R. vs. Wolfe, 85 N. W. Rep., —— decided March 21, 1901, thus states the reasons why the

statute does not violate the fourteenth amendment to the constitution:

"It is sufficient to say that we are content with the soundness of the conclusions arrived at relative thereto and see no reason for abrogating or modifying them. The statute so strenuously attacked was progressive in its nature. The legislature in passing it took into consideration the fact that since the time the liability of of common carriers became fixed at common law through the decisions of court, the means of travel have become revolutionized. From comparatively safe and easily controlled means of travel, invention has progressed until the means have become a complicated and exceedingly dangerous machine propelled through space at an extremely rapid rate of speed and with the workings of which the public were unfamiliar and over which they had not the slightest control. Considering then the old law and the mischief that has arisen through the application of the inventive genius of the age to the means of locomotion, the legislature rightly conceived that the old law relative to the liabilities of common carrier in the respect indicated by this legislation has become obsolete, and it therefore proceeded to exercise the function for which it had been created, by curing that wherein the old law had become defective and inapplicable to modern conditions. Added to this, perhaps, was the consideration that there was no reason for making common carriers insurers of the safety of personal property confided to them that would not apply with equal force to the owners of that property where their persons were being transported from point to point, except, perhaps, those indicated by the exceptions contained in this law. It would seem that in law the owner should at least be equal to if not 'A little better than his dog, a little dear er than his horse.' This equality the law establishes, excepting from such liability the common carrier only in such instances as those wherein his judgment should guide him and prompt him to avoid a threatening danger."

In the case of Clarke vs. Russell. 38 C. C. A. Rep., 541, the question of the constitutionality of this statute was raised

and the statute upheld. The court of appeals in its opinion in this case says:

"A railroad company owes a duty to its passengers to carry them safely. A passenger is powerless to protect himself from injury resulting from derailment or wreck of the car, or from other causes. He is in the care and keeping of the railroad company, and has no knowledge of the railroad, rails, cars, locomotive, engines or other appliances or fixtures, or of the management and conduct of the train; or of the fitness of its employees and is frequently unable to locate the cause of the wreck and convict the company of negligence though the company may have been guilty of negligence. The company in such cases can easily produce evidence of due care which the passenger cannot be prepared to meet. It was considerations similar to these that led to the legislation making the railroad company absolutely liable for the damages resulting from fire escaping from its locomotive engines, and we may add that they are quite as forcible as any that are given for the adoption of the rule that made a common carrier insurer of the goods intrusted to him for carriage.

"It is settled by all the authorities that the carrier is an insurer of the passenger's baggage; and when the rule has not been changed by statute, we have this anomalous condition, that when a passenger and his baggage are injured in the same wreck the railroad is liable for damages done to the baggage irrespective of its negligence. The Nebraska statute does away with this and puts the passenger and his baggage on very much the same footing. And why not? There would seem to be more reason for protecting the passenger than his baggage. When a passenger without any fault on his part is injured, why should not the railroad company compensate him therefor? Grant that the company was innocent of any negligence or intent to injure him; the fact remains that it did injure him; and where one or two innocent persons must suffer a loss, why should not the one who inflicted the injury be required to bear the burden? It is quite clear that a common carrier of passengers who conducts its business by the powerful agency

of a railroad, the right to use which is derived from the legislation of the state, may be required by the state to compensate its passengers for injuries it inflicts upon them independent of any question of its own neglegence. Such a statute cannot be distinguished in principle from those we have referred to imposing an absolute liability for the loss of property by fire, or from the common law rule which imposes an absolute liability for the loss of the passenger's baggage. Both upon principle and authority the Nebraska statute is a valid enactment."

We have quoted thus fully from the opinion in the foregoing case for the reason that it sets out with clearness and force reasons which we contend sustain the statute in question. The fact that in the case of a wreck the company may be guilty of negligence and yet the passengers be utterly unable to prove such negligence, furnishes a most potent reason for the enactment of the statute. It was this consideration, among others, that led to the adoption at common law of the rule making a common carrier of goods absolutely liable for the safe carriage and delivery of property intrusted to him.

In the case at bar, probably a majority of the persons sons familiar with the circumstances surrounding the wreck, believe that the derailment of the train was due to the high speed at which it was running, coupled with some defect, and that the ignorant colored man who happened near the scene of the wreck had nothing to do with it, and has been made a scape-goat to relieve the company of responsibility. Conceding for the purpose of the argument that the wreck was actually caused as claimed by the company, by the criminal act of one Geo. W. Davis, due diligence in the matter of inspecting its track, might have prevented the derailment. A law that holds a railroad company absolutely liable for all injuries to passengers furnishes a powerful inducement to the exercise of the highest possible degree of diligence

and care on the part of such company to avoid such accidents. While injuries to passengers by derailment of trains or otherwise, on account of the high rate of speed, produced by the powerful agency of steam must always occur, yet a state enactment that directly tends to reduce injuries so caused to a minimum, is certainly a valid exercise of the police power of the state. Instead of holding the Nebraska statute invalid, we submit that this court should give it unqualified approval as being a wise and prudent rule designed for the safety of passengers, as well as for their remuneration for damages sustained in case of injury.

(b)

It will be observed that the statute in question gives the railroad company the right to make such rules as it may deem proper and necessary regulating the conduct and movements of the passengers while on its train, and if the passenger be injured while violating any such rule, the company is not liable. Any act which would amount to negligence by a passenger of his personal safety may be forbidden. The company may by rule require the *highest degree* of care by a passenger, and may by its rules forbid acts and movements that in the slightest degree tend to expose the passenger to injury. This provision of the statute alone renders baseless the criticism urged against which provides that "criminal negligence" only on the part of passengers will defeat recovery and that the passenger may be guilty of ordinary negligence and still recover damages.

The railroad company may make such rules as will bar recovery in the case even of slight negligence.

(c)

So far as plaintiff in error seeks to avail itself, in this case, of any claim that this statute deprived it of any defense of contributory negligence, either slight, gross or ordinary, it presents a hypothetical and not a real question. In the case at bar the plaintiff in error neither proved nor offered to prove any contributory negligence on the part of the deceased. The evidence and offers of proof by plaintiff in error were directed solely to the disproof of negligence on its part. The supreme court held in the Zernecke case (of which the Eaton case is a counterpart as to the plaintiff's in error evidence) that there was "an entire absence of evidence" to bring it within the statutory exceptions. See opinion of court in Zernecke record page 175 at top of page. In the offers of proof which embrace the most of the record in the case after page 41, the court will not find any evidence or offer of proof of any contributory negligence whatever. Therefore a reversal by this court for such a reason would give the plaintiff in error the benefit of a construction of the statute that it was not in position to claim, nor did claim in the trial or since. Moreover the latest construction put upon the statute by the supreme court of Nebraska in the case of C. B. & Q. vs. Wolfe, 85 N. W. Rep., ——, decided March 21, 1901, renders the statute invulnerable to this objection. The court holds a railway not liable to the passenger "*in such instances as those wherein his judgment should guide him and prompt him to avoid a threatening danger.*"

The circuit court of appeals of the 8th circuit in a late case, Clark et al., Rec'rs vs. Zarniko, 106 Fed. Rep., (decided Feb. 25, 1901) held that this statute does not make the railway company an insurer, but merely raises a presumption of negligence, and that contributory negligence is a

defense, at least when it is gross. Until a case is prosecuted to this court in which a railway company has been deprived of a defense that it has, and is ready to prove, it would seem that the objection that the statute may not allow such defense is premature.

(d)

But pursuing the argument, as if a case were actually before the court involving all these questions, yet we contend that the Nebraska statute, in thus raising the duties and liabilities of a railway passenger carrier above those imposed by the common law, to those of an insurer except as to the passenger's gross negligence, and except as to his violation of the rules by the railway prescribed, does not deprive the plaintiff in error of its property without due process of law.

1st. The statute was passed in 1867, long before plaintiff in error was incorporated or entered the state. But had it been passed after it had been in the state, the law applied only to the future, and the state can change the liabilities of corporations, and can regulate their relations to the public and their passengers and legislate for their lives and safety.

R. R. Co. vs. Mackey, 127 U. S. 205.

2nd. This law is essentially a police regulation. It is not a regulation of general property rights, nor is it a punishment for the non-payment of debts in general, as was the statute in the case of R. R. Co. vs. Ellis, 165 U. S. 150. It applies solely to cases involving the life and safety of passengers, as the Kansas statute passed upon in the case of A. T. & S. F. R. R. vs. Mathews, 174 U. S. 96, applied solely to cases of loss by fire. It is so construed by the Nebraska supreme court.

3d. It is urged that it changes the common law relations of carriers to passengers. In truth, the carriers have changed the relations between themselves and their passengers existing when the rules of the common law were fixed, by adopting the results of invention, so that travel has been revolutionized. They cannot complain if courts and legislatures take knowledge of these vast changes and legislate to meet the new conditions.

4th. The common law rules of liability and of evidence of liability are not such that they may not be changed when the security of the citizens requires it. This court has repeatedly held that laws having special effect on railways, and changing their relations and liabilities to the public from those under pre-existing laws violated no constitutional right. In R. R. Co. vs. Beckwith, 129 U. S., 26, this court upheld a statute of Iowa that was open to the same objections urged against this statute. Such statute made railroads liable for stock killed, independently of whether the railway was negligent or not, and the only exception was the wilful negligence of the person damaged, in this respect much broader than the Nebraska statute.

The Iowa statute imposed no duty to fence, except as implied from the liability imposed by the failure to do so, and required the payment of double damages, and took away contributory negligence as a defense unless it was wilful. In Nebraska a statute almost identical, found in the section preceding this passenger statute and a part of the same act has been many times upheld by the Nebraska supreme court. In R. R. Co. vs. Humes, 115 U. S. 512, this court sustained a Missouri statute making railroads liable absolutely for all stock killed where they had failed to fence, without regard to contributory negligence, the law providing that where fences were erected the railway was liable

only for negligence or wilful injury. The Nebraska statute and these statutes embody the same principles, the only difference being the occasion calling for their application, the one occasion being to enforce a new statutory or implied duty to fence, the other the old common law duty to safely carry the passenger. The duty owing the passenger is certainly as great as the statutory duty. In the recent case of R. R. vs. Mathews, 169 U. S., 65, the statute made the railway company absolutely liable as insurers against damages by fire communicated from their engines. This liability was not predicated on the violation of any statutory duty but on the principle of the general duty owing by railways to prevent destruction by fire. "To require the utmost care and diligence" says Justice Gray in this case, "of the railway corporations in taking precautions against the escape of fire from their engines, might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the legislature may consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railway company, which employs the instruments and creates the peril for its own profit rather than upon the owner of the property who has no control over or interest in those instruments."

The validity of such a statute does not depend on the giving by it of an insurable interest to the railroad company, for this court in A. T. & S. F. R. R. vs Mathews, 174 U. S., 96, sustained a Kansas statute making the railway liable for damages caused by fire, when there was no provision in the statute giving such insurable interest.

But if the right to insure against such losses is to be considered a reason for upholding the statute, yet it was not

necessary for this statute to give the railroad an insurable interest against loss by such accidents, for the reason that the railway had the undoubted right to insure against its losses as a common carrier, whether they arose from negligence or accident. Such indemnity insurance is now one of the commonest forms of insurance.

Phoenix Ins. Co. vs. Transportation Co., 117 U. S. 312.

California Ins. Co. vs. Union Co., 133 U. S. 387.

Ins. Co. vs. Merrill, 155 Mass., 404.

Phillipsburg Co. vs. Ins. Co., 160 Pa., St. 350.

Ross vs. Ins. Co., 56 N. J. Eq. 41, (38 Atl. 22.)

Joyce on Ins. Secs. 2800-2803.

5th. This statute does not deprive plaintiff in error of its property without due process of law because it changes the the pre-existing common law rules. Very few statutes imposing duties or liabilities under the police power do not cause such a change. The statutes above noted requiring fences built along the track, had this effect. The same objection was made in this court to those statutes that abolished the common law defense as to the negligence of fellow servants in actions by employees for negligence.

This court has repeatedly held that it was within the power of the state to make the railway liable to a servant for a fellow servant's negligence, and the deprivation of such common law defense is not within the 14th amendment.

Tullis vs. R. R. Co., U S. , 20 S. C. R. 136.

M. P. R. R. vs. Mackey, 127 U. S., 205.

Minneapolis R. R. vs. Herrick, 127 U. S. 210.

For many years the decisions of the Illinois courts and of other states were upheld applying in place of the doctrine of contributory negligence the doctrine of comparative negligence. The Nebraska statute does not more offend against the constitution than this doctrine. The common law defense, arising from the slightest contributory negligence was not such property but that the courts of Illinois, Georgia and many other states could deprive defendants by judicial decisions in cases of negligence. It would seem to be within the power of the legislature to pass a law which does not thus offend more than judicial precedents.

Does not Deny Equal Protection of the Law.

The equal protection of the laws which is guaranteed by the fourteenth amendment of the constitution, does not forbid classification of subjects of legislation. Such has been the repeated holdings of this court.

In the case of A. T. & S. F. R. Co. vs. Mathews, 174 U. S. 101, a statute of Kansas allowing the plaintiff to recover an attorney's fee in case of recovery against a railroad company for damages occasioned by fire, Judge Brewer in delivering the opinion of the court says:

> "The equal protection of the laws which is guaranteed by the fourteenth amendment, does not forbid classification. It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Thus when the legislature imposes on railroad corporations a double liability for stock killed by a passing train, it says in effect that if suit be brought against a railroad company for stock killed by one of its trains, it must enter into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit it must pay not only the damages it has done, but twice that amount. If it succeeds it recovers nothing. On the other hand, if

it should sue an individual for destruction of its live stock, it could under no circumstances recover any more than the value of the stock. So that it may be said in the matter of liability, in case of litigation, it is not placed on an equality with other corporations or individuals; yet this court has unananimously said that this difference of liability, this inequality of right in the courts is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

In the case of New York etc., vs. Town of Bristol, 151 U. S. 556, Chief Justice Fuller says:

"The conclusion of this court has been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public and they are intrusted with the right of eminent domain only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression. That there is no unjust discrimination and no denial of the equal protection of the law in regluations applicable to all railroad corporations alike. And that the adjudications of the highest court of a state that in such particulars a law enacted in the exercise of the police power of the state, is valid, will not be reversed by this court on the ground of an infraction of the constitution of the United States."

In Charlotte etc. R. R. Co. vs. Gibbs, 142 U. S. 386, speaking of the power of the states to pass laws regulating railroad companies, Mr. Justice Field says:

"That regulations may extend to all measures deemed essential not only to secure the safety of passengers and freight, but to promote the convenience of the public in transacting business with them. In requiring this there is no encroachment upon the fourteenth amendment."

In Minneapolis etc. R. R. Co. vs. Emmons, 149 U. S. 364, the validity of a statute of the state of Minnesota making railroad companies liable for treble damages for stock killed on account of failure to fence its road was involved. It was held valid. In the opinion it is said:

> "The extent of the obligations and duties required of railway corporations or companies by their charter does not create any limitation upon the state against imposing all such further duties as may be deemed essential or importamt for the safety of the public, the security of passengers and employees or the protection of the property of adjoining owners."

The case of M. P. Ry. Co. vs. Mackey, 127 U. S. 205, is in point. In this case, speaking of the constitutionality of the statute of Kansas, making the railroad companies liable for damages sustained by its employees, caused by the negligence of fellow servants, says:

> "The hazardous character of the business of operating railroads, would seem to call for special legislation with respect to a railroad corporation, having for its object the protection of their employees, as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objection therefore can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity and all railroad corporations are without distinction made subject to the same liabilities, As said by the court below, it is simply a question of legislative discretion whether the same liability shall be applied to a carrier by canal and stage coaches.and to persons and corporations using steam in manufacturies."

The foregoing decision is distinctly approved and quoted with approval in the late case of Tullis vs. L. E. & W. R. R. Co., U. S. 20 Sup. Ct. Rep. 136, and in R. R. Co. vs. Mathews, 169 U. S. 25, and also in C. K. & W. R. R. vs. Pontius, 157 U. S. 209. Such legislation has been upheld in many states.

In the case of R. R. Co. vs. Paul, 37 L. R. A. Rep., 504, the supreme court of Arkansas, where a similar question is involved, says:

> "A statute imposing certain duties and liabilities on one class of corporations only, does not deny them the equal protection of the laws if the peculiar character of the business of the corporation is sufficient to justify this discrimination."

And this was affirmed in St. Louis R.R. Co. vs. Paul, 173 U. S. 404.

The supreme court of Missouri speaking of the statute making railroad companies liable for all fires set out by their locomotive engines, in the case of Mathews vs. R. R. Co., 121 Mo. 298, says:

> "If it could be shown that this statute imposes a burden on railroads from which it exempts others under the same or similar circumstances, then it would be open to the criticism that it deprives railroad companies of the equal protection of the law. But if the circumstances are different, if no other person, natural or artificial, is authorized to condemn or purchase a strip of land running through the lands of others, on its route and to run trains propelled by steam over its road at all times, day or night, and at all seasons, wet or dry, and using engines that scatter fire on the bordering property, though operated with a degree of care that amounts to faultlessness, all for its own profit, then we say that the statute is not obnoxious to the charge of denying railroads the protection it accords to others. So long as the statute imposes these duties on the only agents that have like powers to create similar hazards, it cannot be charged with inequality or unjust discrimination."

The claim of counsel that the statute deprives the plaintiff in error of the equal protection of the laws because it makes a railroad company liable in cases where it is not guilty of any fault or negligence, is entirely untenable.

In the recent case of R. R. Co. vs. Mathews, 169 U. S. 65, the Supreme Court of the United States held constitutional the statute of Missouri, rendering the railroad absolutely liable for all damages caused by fire set out by its engines. The basis of the liability is the dangerous character of the instrumentality used.

The reasoning in this case applies with equal force to the Nebraska statute in question. The court says:

> "To require the utmost care and diligence of a railroad corporation in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of railroads. When both parties are entirely faultless, the legislature may perhaps consider it to be just that the duty of insuring private property along its line from injury caused by the use of dangerous instruments, should rest on the railroad company, which employs the instruments, and creates the peril for his own profit, rather than on the owner of the property who has no control over or interest in these instruments."

In the same opinion the court further says:

> "The statute is not a penal one, imposing a punishment for the violation of a law, but is purely remedial, making a party doing a harmful act for its own profit, liable in damages to an innocent party injured thereby, and giving to that party the whole damages measured by the injury received. The statute is the constitutional and valid exercise of the legislative power of the state, and applies to all railroad corporations alike. Consequently it neither violates any contract between the state and the railroad company, nor deprives the company of its property without due process of law, nor yet denies it equal protection of the laws."

See also on this point the cases of Tullis vs. R. R. Co., U. S. 20 Sup. Ct. Rep. 136 and R. R. Co., vs. Mackey, 127 U. S. 205., in which it is held that the statutes of sev-

eral states by which railroad companies are held liable for damages sustained by their employees through the negligence of fellow servants, do not deny the equal protection of the law.

It is claimed by the railroad company that the provisions of the statute are harsh and oppressive. This claim we believe we have shown to be without foundation, but conceding such claim to be true, that would not render such statute unconstitutional.

In the case of Missouri Pac. Ry. Co. vs. Humes, 115 U. S. 512, this court holds that if a state law be within the legitimate sphere of legislative power and enforced according to general rules prescribed for security of private rights, their harshness, injustice and oppressiveness will not invalidate them as affecting life, liberty or property without due process of law.

Mr. Justice Field in his opinion says:

> "It is hardly necessary to say that the hardship, impolicy or injustice of state laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from state legislatures."

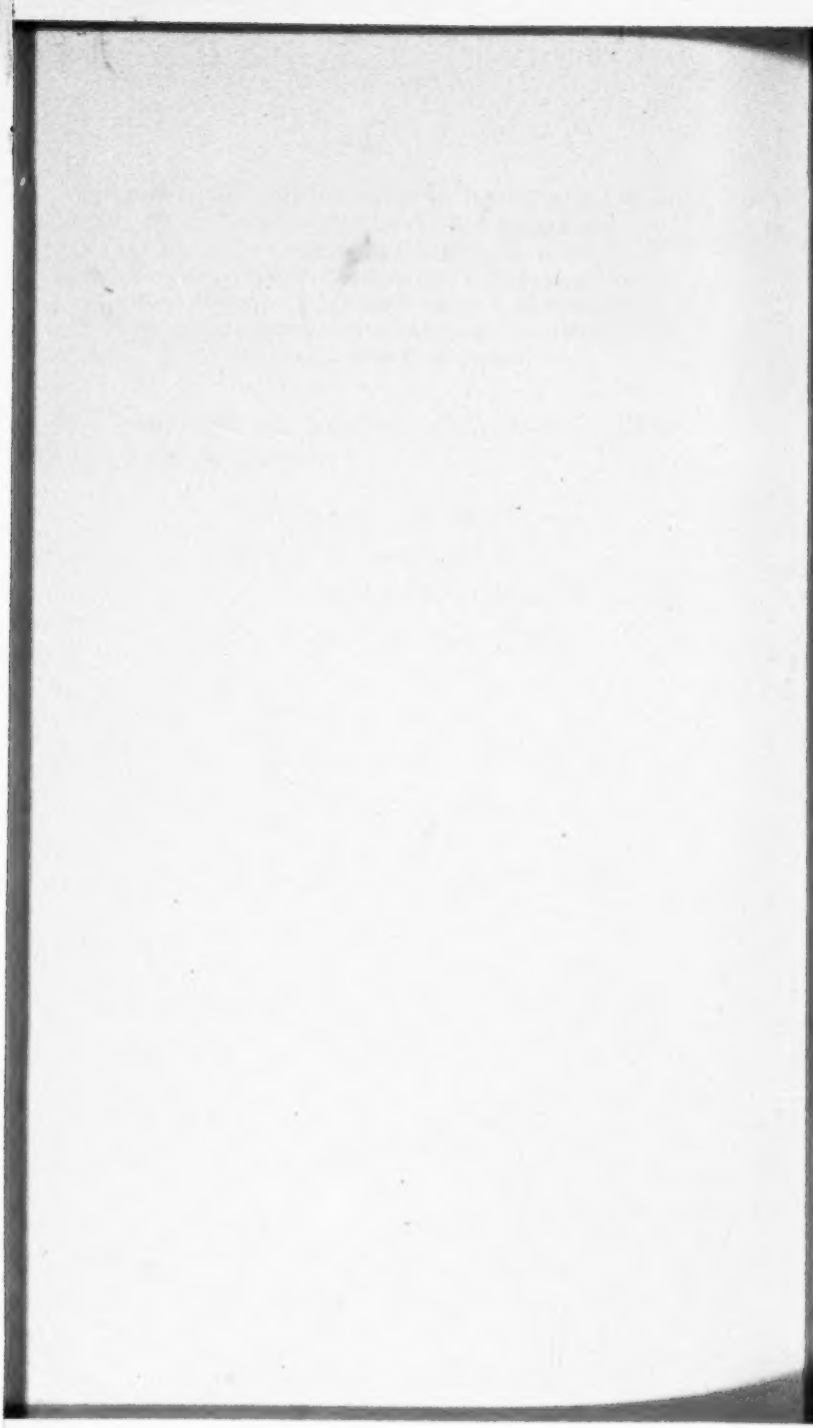
In the case of New York etc., R. R. Co. vs. Town of Bristol, 151 U. S. 556, it was held that a statute of Connecticut was constitutional which required railroad companies to pay the expense of abolishing grade crossings. The contention of the railroad company was that the provisions of the act was so unreasonable and unjust as to bring it within the constitutional inhibiton. On this question Chief Justice Fuller says:

> "But this court cannot proceed upon general ideas of the requirements of natural justice, apart from the provisons of the constitution supposed to be involved. As

observed by Mr. Justice Miller in Davidson vs. New Orleans, 96 U. S. 97 ,104, the 14th amendment cannot be availed of as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in the state court of the justice of the decision against him, and of the merits of the legislation on which such decision may be founded."

We submit that the judgment of the Supreme Court of Nebraska should be affirmed.

THOMAS C. MUNGER and
JOHN M. STEWART,
Attorneys for Defendant in Error.
A. E. HARVEY, of Counsel.



[illegible] 11333

Supreme Court of the United States.

No. 57.—October Term, 1901.

The Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error, vs. Webster Eaton, Administrator of the estate of John R. Mathews, deceased. } In error to the Supreme Court of the State of Nebraska.

[January 6, 1902.]

Mr. Justice McKenna delivered the opinion of the Court.

This action was brought in the district court of Thayer County, Nebraska, by the defendant in error as the administrator of the estate of John R. Mathews, deceased, against the plaintiff in error, for damages, under a statute of the State, for the death of Mathews, caused by the derailment of the train of plaintiff in error upon which Mathews was a passenger.

The record presents the same questions which were presented and passed on in the case of the plaintiff in error herein against Zernecke, administratrix, No. 58 of this term, just decided. As in the latter case the ground of action in the case at bar was in the railroad company and its servants. The answer of the company denied negligence, and alleged that the derailment was caused by some person or persons unknown to the company, and not in its employment or under its control, who willfully, maliciously and feloniously removed and displaced from the track certain spikes, nuts, angle-bars, fishplates, bolts and rails, and otherwise tore up and destroyed the track. The company also alleged care in the maintenance of its track and the management of its train.

Negligence

The petition alleged that the plaintiff in error "was a corporation, duly incorporated under the laws of the State of Nebraska," and the admission of the answer was that defendant in error, "at all times mentioned in said petition, was a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa, and a domestic corporation of the State of Nebraska."

The case was tried before a jury. The evidence of defendant in error (petitioner) was that at the time Mathews was killed he was being transported as a passenger over the railway of plaintiff in error, and that the train upon which he was riding was thrown from the track, resulting in his death and the death of ten other persons. The plaintiff in error then offered witnesses and depositions to sustain the allegations of its answer.

The testimony, upon the objection of defendant in error, was rejected, and at the close of the evidence, on motion of defendant in error, the court instructed the jury as follows:

"The jury is instructed that if you find from the evidence that John R. Mathews was a passenger, being carried on the train of the defendant railway company that was derailed and wrecked near Lincoln Nebraska, on August 9, 1894, thereby causing the death of said Mathews, and that plaintiff is the administrator of the estate of said Mathews, then you should find for the plaintiff if you find a pecuniary loss from such death has resulted to the next of kin, in this case the father."

The jury returned a verdict for defendant in error for $1,500, upon which judgment was entered. The judgment was affirmed by the Supreme Court of the State, upon the decision in *Chicago, Rock Island & Pacific Railway Company* v. *Zernecke, Administratrix*, (59 Neb. 689,) and this writ of error was then allowed.

The facts, contentions and questions being the same as those presented in the Zernecke case *supra*, for the reasons stated in the opinion in that case the judgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.